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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT,

Petitioner,

vs.

PHILIP MORRIS, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals demonstrate the proper respect for the State's sovereign interests in prosecuting a statutory sovereign enforcement action under its unfair trade practices and antitrust acts, as required by the federalism principles recognized in *Younger v. Harris*, when it disregarded the stated sovereign enforcement aspects of and the broad injunctive relief sought in the State's action, and instead characterized the action as one for money damages only?

2. Do the federalism principles underlying *Younger v. Harris* permit a federal court to disregard the purposes for a State's pending action asserted in the State's Complaint and recharacterize the action contrary to the State's pleading, for purposes of determining whether the action implicates an important state interest under *Younger*?

3. Does the State of Connecticut's state court sovereign enforcement action against four tobacco companies, brought pursuant to the explicit provisions of Connecticut's unfair trade practices and antitrust acts, which empower the sovereign, on behalf of the State and its citizens, to bring actions to remedy violations of the acts, and seeking broad injunctive and equitable relief, as well as damages, to remedy one of the most massive conspiracies, frauds and restraints of trade in our nation's history, implicate an "important state interest" for purposes of applying the *Younger* abstention doctrine?

4. In determining the importance of the State interest implicated by a State's action for purposes of

applying *Younger*, may a federal court -- consistent with principles of federalism -- disregard the allegations of a State's complaint, reject the basis for the State's action asserted in and the relief sought in the Complaint, and and recharacterize the gravamen of and the "primary aim" of the action contrary to the State's pleading?

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the plaintiffs were Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corporation, USA, and Lorillard Tobacco Co.

The defendant in both courts below was Richard Blumenthal, Attorney General for the State of Connecticut.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Richard Blumenthal, Attorney General for the State of Connecticut, prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS OF THE COURTS BELOW

The order of the United States Court of Appeals for the Second Circuit denying the petitioner's Petition For Rehearing and Suggestion For Rehearing In Banc, dated

November 24, 1997, is unreported and is printed in the appendix to this petition at App. A1. The opinion of the United States Court of Appeals for the Second Circuit entered on September 12, 1997, is reported at *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103 (2d Cir. 1997), and is printed in the appendix to this petition at App. A3.

The memorandum of decision of the United States District Court for the District of Connecticut, *Dorsey, C.J.*, dated December 23, 1996, is reported at *Philip Morris, Inc. v. Blumenthal*, 949 F. Supp. 93 (D.Conn. 1996), and is printed in the appendix to this petition at App. A14.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on September 12, 1997. The petitioner timely filed a Petition For Rehearing and Suggestion For Rehearing In Banc, which the United States Court of Appeals for the Second Circuit denied on November 24, 1997. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1281(1). This petition is filed within ninety days of the Court of Appeals' ruling dated November 24, 1997. Supreme Court Rule 13.1; 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[Reprinted In Appendix]

STATEMENT OF THE CASE

On July 1, 1996, the respondents, Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. and Lorrillard Tobacco Co., ("the tobacco companies") instituted this action against the petitioner, Connecticut Attorney General Richard Blumenthal, seeking to bar the State of Connecticut from "prosecuting or

imposing or enforcing the liability" on them pursuant to a "Threatened Lawsuit" that -- the tobacco companies contend -- would violate their federal constitutional rights. (JA 11)

In their Complaint, the tobacco companies seek declaratory and injunctive relief from this "Threatened Lawsuit" in each of nine Claims for Relief.[1/] According to the tobacco companies, (i) it would violate the Commerce Clause and the First, Fifth and Fourteenth Amendments for the State to seek to recover health care costs paid by the State through its Medicaid program as a remedy for their alleged unlawful conduct; (ii) the State's "Threatened Lawsuit" is preempted by federal laws; and (iii) the State's "Threatened Lawsuit" would violate Connecticut's constitution, statutes and common law.

Although the tobacco companies contended that they would suffer irreparable harm from the State's filing of its "Threatened Lawsuit," none of them sought preliminary injunctive relief at the time they filed their federal Complaint, nor took any action in federal court thereafter to pursue their claims.

On July 18, 1996, the State of Connecticut in fact served and filed a state court action against the four respondent tobacco companies in this matter, as well as against three other tobacco companies and three entities affiliated with the tobacco industry.[2/] (The State of Connecticut's

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1/ The tobacco companies' First through Seventh and Ninth Claims for Relief are brought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and their Eighth Claim for relief is brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. (JA 27 to 38)

2/ The State's lawsuit, *State of Connecticut v. Philip Morris, Inc., et al.*, Docket No. CV 96-0072414 S (Judicial District of Litchfield) named as defendants, in addition to the four respondents in this case, B.A.T. Industries P.L.C., Liggett Group, Inc., United States

State Court Complaint is reprinted in the Appendix at A18) This action, now pending in Connecticut Superior Court,[3/] details a course of fraudulent and illegal conduct by the tobacco companies dating back to 1953 and continuing to date, including the knowing concealment and misrepresentation of scientific information concerning the health dangers of their products, the misrepresentation of the addictive nature of their products, the targeting of minors, and an unlawful conspiracy in restraint of trade. The Complaint asserts that the state court defendants, individually and in concert, have participated in a course of deceptive, unfair and wrongful conduct intended to mislead the public about the health dangers and addictive nature of their products, have unlawfully marketed their products to minors, and have engaged in a continuing conspiracy to restrain trade, in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a, et seq.; the Connecticut Antitrust Act, Conn. Gen. Stat. § 35-24, et seq.; and Connecticut common law.

The Complaint seeks broad injunctive and other equitable relief, including the entry of orders:

Tobacco Co., Hill and Knowlton, the Council For Tobacco Research - U.S.A., Inc. and the Tobacco Institute, Inc.

3/ The State of Connecticut initially filed its action in Connecticut Superior Court, Judicial District of Stamford. On August 5, 1996, the ten tobacco defendants in Connecticut's removed that action to federal court, claiming federal question jurisdiction. The District Court, *Arterton, J.*, granted Connecticut's motion to remand to state court, holding that the tobacco defendants' attempt to manufacture federal jurisdiction "borders on the frivolous." Subsequent to remand, the State's action was assigned to one judge, who is presently sitting in the Judicial District of Litchfield, where the action is now docketed.

(i) enjoining the defendants' unlawful conduct;

(ii) requiring implementation of funding of remedial programs;

(iii) requiring restitution to consumers and the State for harms caused by the tobacco companies' harmful conduct;

(iv) requiring disgorgement of defendants' wrongfully gained profits; and

(v) assessing civil penalties under CUTPA and the Connecticut Antitrust Act. (A127 to A132)

The State's Complaint also requests actual and statutory treble damages under Connecticut's Antitrust Act, including actual damages for harm to the general economy of the State (A129), along with claims for disgorgement and damages for harm to consumers, as provided for under CUTPA, Conn. Gen. Stat § 42-110m. (A130 to A132)

In addition, the complaint seeks as one aspect of damages, but only one aspect, an award for the increased expenses the State has incurred as a result of the defendants' wrongful conduct, including, but not limited to, restitution or reimbursement of Connecticut's increased expenses under the State's Medicaid and General Assistance Medical Assistance programs as a result of tobacco-related illnesses. (A131) *See* Conn. Gen. Stat. §17b-260 *et seq.*; § 17b-220 *et seq.*

The Commissioner of Consumer Protection of the State of Connecticut authorized and requested the CUTPA claim asserted in the State's Complaint pursuant to his statutory authority to monitor, investigate and take action to prevent unfair and/or deceptive trade practices affecting the Connecticut public. *See* Conn. Gen. Stat. §§ 42-110d, 110k,

110m & 110n. In particular, the Commissioner has acted pursuant to Conn. Gen. Stat. § 42-110m, which empowers him to request the state Attorney General to prosecute actions to enjoin ongoing unfair trade practices and obtain restitution and other equitable relief for such unlawful conduct. The Commissioner is an appointee of the Governor, the head of Connecticut's executive branch.

The antitrust claim has been instituted pursuant to the statutory authority the Connecticut General Assembly has conferred upon the state's Attorney General, a state constitutional officer, to investigate, monitor and take action against unlawful restraints of trade in the State, *see* Conn. Gen. Stat. §§ 35-32(a) & 35-42, and asserts claims, *parens patriae*, on behalf of the residents of the State of Connecticut, and on behalf of the State itself, as expressly authorized by the Connecticut General Assembly. *See* Conn. Gen. Stat. §§ 35-32(c)(1) & (2).

The Attorney General has brought the common law counts in his capacity as the state's chief legal officer, with the duty to act in the state's best legal interest. Conn. Gen. Stat. § 3-125; *Commission on Special Revenue v. FOIC*, 174 Conn. 308, 318-19, 387 A.2d 533 (1978).

The tobacco companies' federal Complaint expressly acknowledges that it was filed in anticipation of the State's lawsuit, which was filed less than three weeks after the tobacco companies' Complaint here. (JA 9; 11) No substantive proceedings of any kind took place in the District Court on the tobacco companies' action, either prior to or after the initiation of the State's action. Further, the tobacco companies make no allegation in their federal Complaint that Connecticut's state courts will be unable or will refuse to resolve, fully and fairly, the claims asserted in the State's action, including any federal constitutional or statutory defenses the tobacco companies may assert.

Concurrent with the institution of the State's action, the petitioner moved to dismiss the tobacco companies' Complaint in this case on the grounds of *Younger* abstention, arguing that the tobacco companies had brought the action solely to disrupt the State of Connecticut from appropriately and lawfully vindicating its sovereign interests in state court. The District Court, *Dorsey, C.J.*, agreed and granted the motion on December 23, 1996. *Philip Morris, Inc. v. Blumenthal*, 949 F. Supp. 93 (D.Conn. 1996).

The tobacco companies appealed to the United States Court of Appeals for the Second Circuit, which reversed and remanded, on the ground that the State's action did not, in that Court's view, implicate any important state interest. The Court ruled that it could disregard the State of Connecticut's state court allegation of a sovereign enforcement action, look behind the State's asserted purposes and characterize the action as merely a subrogation action, the "primary aim" of which was to recover money damages. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103 (2d Cir. 1997). After the Court of Appeals' denied his Petition For Rehearing and Suggestion For Rehearing In Banc, the petitioner has filed this petition.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition and issue the writ because the Court of Appeals' decision raises important issues regarding the application of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny.

Specifically, the Court of Appeals' opinion raises critical issues regarding *Younger's* application in this and future actions, including whether a federal court in determining whether a State's action involves and important state interest for *Younger* purposes is permitted to disregard the

State's asserted interests in favor of its own characterization of the lawsuit?

To reach its conclusion, the Court of Appeals took the liberty of disregarding the legal theories the State had asserted in its lawsuit in favor of the federal court's own, unsupported recharacterization of the lawsuit. Contrary to the Court of Appeals' belief, a federal court does not have the authority to make unsupported assumptions about the theory of recovery posited in a state court action or about a sovereign enforcement action's "primary aim." In this regard, the Court of Appeals did not undertake the proper inquiry directed by *NOPSI v. Council of New Orleans*, 491 U.S. 350 (1989). Rather than focusing on the "importance of the generic proceedings to the State," as this Court has instructed; *id.* at 365; the Court of Appeals instead focused on one of the "outcomes" the State's lawsuit seeks: money damages. By its fundamental mischaracterization of the nature Connecticut's state court action against the tobacco companies and profound misapprehension of the nature and importance of the interests the State seeks to vindicate by its action, the Court of Appeals failed to pay the proper respect to State sovereignty that the *Younger* doctrine demands.

Finally, the Court of Appeals' determination that Connecticut's sovereign enforcement action against the tobacco companies implicates no important state interest, in addition to defying logic, is plainly inconsistent with this Court's precedents. The State's action alleges one of the most massive conspiracies, frauds and restraints of trade in our nation's history, inflicting great damage upon the State and its citizens. The State's action seeks broad remedial relief aimed at the grave injuries the tobacco companies' conduct and their products have inflicted upon the public's health. It is impossible to ignore the importance of these

goals in light of the historic national settlement presently pending in Congress. This proposed settlement, which would include a settlement of Connecticut's lawsuit and which was negotiated by several state attorneys general, including the petitioner, and representatives of all of the respondents, contains many of the same remedial initiatives claimed in the Connecticut's state court lawsuit, which the respondents and the Court of Appeals simultaneously argue manifest no significant state interest.

It is therefore inconceivable that the State's action does not implicate several important state interests. The Court of Appeals' dismissive treatment of the State's interests in this case is an affront to the State and its citizens, and displays none of the "sensitivity to the legitimate interests" of the State governments that *Younger* counsels federal courts to engage in.

All of these "special and important reasons" warrant this Court's granting of the petition. The Court of Appeals' decision "so far depart[s] from the accepted and usual course of judicial proceedings," and decides "an important question of federal law which has not been, but should be settled by this Court," in addition to deciding a "federal question in a way that conflicts with applicable decisions of this court." Supreme Court Rule 10.1(a) & (c).

I. THE *YOUNGER* DOCTRINE AND ITS UNDERLYING PRINCIPLES OF FEDERALISM, COMITY AND JUDICIAL ECONOMY REQUIRE DEFERENCE TO A STATE PROCEEDING ADVANCING AN IMPORTANT STATE INTEREST.

"*Younger* . . . and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary

circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (emphasis supplied). As Justice Black eloquently stated for the Court in *Younger*, the policy is based, in part, on the traditional constraints on equity courts, but also on the

> even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the State and their institutions are left free to perform their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism."

Younger v. Harris, 401 U.S. 37, 44 (1971). In addition, the doctrine of *Younger* abstention seeks to avoid duplicative legal proceedings and "to avoid unwarranted determination of federal constitutional questions." *Pennzoil Co. v. Texaco*, 481 U.S. 1, 11 (1987).

Although *Younger* itself concerned a pending state criminal action, the doctrine "is also fully applicable to civil proceedings in which important state interests are involved." *Moore v. Sims*, 442 U.S. 415, 423 (1979) (applying *Younger* abstention to state court child-abuse proceeding).[4/]

[4/] Thus, where important state interests are involved, this Court has repeatedly held that comity, federalism and judicial economy require that federal courts avoid interference with a state's legitimate processes. *See e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-06 (1975) (*Younger* applies with equal force to civil proceedings brought by state to promote sovereign interests); *Trainor v. Hernandez*, 431 U.S. 434, 443-44 (1977) (*Younger* applies to suits by state in its role of administering its public assistance programs in light of important state interest in

Thus, to determine if *Younger* abstention is appropriate, a Court must determine that: (1) there is an ongoing state proceeding; (2) an important state interest is implicated; and (3) there is an adequate opportunity in the state court proceeding to raise constitutional challenges. *Middlesex County Ethics Comm. v. Garden State Bar Association*, 457 U.S. 423, 432 (1982). The Court of Appeals easily determined that there was an ongoing state proceeding and that the tobacco companies could obtain review of their federal claims in state court. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 105 (2d Cir. 1997). The Court went on, however, to state: "we do not find that the federal (*sic*) action implicates an important state interest within the meaning of *Younger*." *Id.* This conclusion simply defies logic, ignores this Court's precedent and egregiously infringes upon the State's sovereign interests.

II. IN EVALUATING THE IMPORTANCE OF THE STATE'S INTEREST, A FEDERAL COURT MUST CONSIDER THE "IMPORTANCE OF THE *GENERIC* PROCEEDINGS" TO THE STATE, AND NOT FOCUS ON "OUTCOMES" OR ATTEMPT TO DECIDE STATE LAW QUESTIONS.

In *NOPSI v. Council of New Orleans*, 491 U.S. 350, 375 (1989), this Court stated:

> [I]t is clear that the mere assertion of a substantial constitutional challenge to state

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safeguarding the fiscal integrity of those programs); *Middlesex County Ethics Comm. v. Garden State Bar Association*, 457 U.S. 423, 432 (1982) (reiterating that *Younger* applies to state's civil proceedings "necessary for the vindication of important state policies"). In fact, the Court has applied *Younger* even to civil proceedings in which the state is not itself a party. *Pennzoil Co. v. Texaco*, 481 U.S. 1, 11 (1987) (*Younger* applies in lawsuit between private parties).

> action will not alone compel the exercise of federal jurisdiction. . . . That is so because when we inquire into the substantiality of the State's interest in its proceedings we *do not look narrowly to its interest in the outcome of the particular case* -- which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the *generic* proceedings *to the State*. (emphasis supplied).

While paying lip service to this standard, *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 106 (2d Cir. 1997), the Court of Appeals in fact disregarded it, concluding that Connecticut's state court action did not concern "central sovereign functions of the state government," and adopting wholesale, with no analysis, the tobacco companies' characterization of the State's lawsuit as "primarily" or "essentially" one for money damages.

The Court of Appeals reasoned:

> Although the state pleads its action in state court as an enforcement action pursuant to CUTPA and the state antitrust law to prevent deception and unfair and anticompetitive business practices -- arguably important state interests -- the *underlying claim is more accurately classified as a subrogation action* grounded in tort. *Notwithstanding certain other claims, the primary aim of the state is to obtain reimbursement* from the tobacco industry for expenditures caused by its allegedly tortious conduct. This purpose has little to do with eradicating unfair trade practices or anticompetitive practices.

Id. (emphasis supplied). It then labeled the State's action as "essentially a suit for money damages." *Id.* The Court of

Appeals therefore dissected the State's Complaint, ignored its public health and consumer protection aspects and arrived at its own characterization of the action. This characterization is not only conclusory and inaccurate, but is not a federal court's to make and is contrary to *NOPSI*.

It is the paradigm of understatement, particularly in this case, to describe the State's CUTPA and antitrust laws as implicating "arguably" important interests. The State's action alleges one of the largest consumer deceptions (concealing smoking's health hazards and addictiveness), restraints of trade (conspiring to suppress development of a less hazardous product) and unfair trade practices (purposefully marketing to minors, who cannot legally purchase tobacco products, to replace those killed by the products) in this nation's history. The relief sought seeks to remedy the grave injury to public health inflicted by this conduct. Nevertheless, the Court of Appeals held that despite these important interests, "the *underlying* claim is more accurately classified as a subrogation action." Both parts of this statement are unsupportable.

Taking the latter part first, the State's action can in no way be described as a subrogation claim. To the contrary, the State purposely drew its Complaint to make clear that its claims are in no way derivative of the claims of individual consumers harmed by the tobacco companies' products and/or conduct, but rather seek damages for *direct harm* to the State *caused by the tobacco companies' conduct*. As an example, the CUTPA claim can in no way be characterized as a subrogation claim because it does not pray for general damages, such as are available under Conn. Gen. Stat. § 42-110g, but rather is a sovereign enforcement action, brought at the request the Commissioner of Consumer Protection under Conn. Gen. Stat. § 42-110m that

seeks restitution and other equitable relief to remedy wrongful or deceptive conduct.

The proper characterization of the types of claims the State's action alleges, and the determination of whether they are cognizable, is a State law question, and one that is presently pending before a State court judge who has received hundreds of pages of briefs on the issue. In fact, although the tobacco companies contend that the State's causes of action are non-cognizable, they have acknowledged that the State's action is not a subrogation claim at all.[5/] It is not for a federal court to characterize the gravamen of the State's action for purposes of determining whether to apply comity and federalism principles underlying *Younger*. In fact, the principles of comity and federalism underlying the *Younger* doctrine prevent such a characterization. Thus, classifying the State's action as one of subrogation is not only inaccurate, but improper.

As importantly, the State's claims for Medicaid reimbursement, however characterized, in no way "underlie" its CUTPA and antitrust claims. The State's legal claims, even

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[5/] In *Philip Morris v. Harshbarger*, 946 F.Supp. 1067 (D. Mass. 1996), upon which the Court of Appeals relied for this conclusion, the District Court accepted the tobacco companies' argument that an action that Massachusetts brought against them in state court did not involve important state interests. Describing the action as merely "a suit for money damages; *id.* at 1077; the District Court held that the Massachusetts action "is seeking a remedy that is classically in the nature of subrogation." *Id.*

Beyond the fact that the State disagrees with this characterization, and as detailed in the defendant's appellee brief, the District Court in *Harshbarger* did not have before it classic state sovereign enforcement claims that the District Court in the instant case did: the CUTPA and antitrust claims. Thus, the District Court in this case correctly distinguished *Harshbarger* on this ground.

if involving some overlapping facts, are independent of one another and do not rise or fall together. This misunderstanding and mischaracterization was critical to the Court of Appeal's holding. Under its reasoning, if the State only alleged CUTPA and antitrust violations, *Younger* abstention would be appropriate because those statutes implicate important state interests. The minute a claim seeking reimbursement is injected into the case, however, the Court of Appeals holds that the State's expectation of comity vanishes and the federal court's respect for the state's legitimate processes is no longer due. By this theory, perhaps thousands of actions brought by sovereign states in the consumer protection, anti-trust, environmental and health-care fraud areas would be liable to preemptive collateral federal lawsuits if they seek monetary recovery, notwithstanding the extremely important interests they otherwise seek to vindicate. This is a practical result the federal judiciary should not tolerate.

Still, the Court of Appeals states that Connecticut's action is "essentially" one for money damages, with a "primary aim" of reimbursement. The only support for this characterization, however, is the tobacco companies' bald assertion. The District Court heard no evidence on what the "primary aim" of the lawsuit was, and, if anything, found that this was not the primary aim. The only evidence of record on this point is the State of Connecticut's state court Complaint, and the Court of Appeals fails to explain how the terms of that Complaint support its conclusion. The Court of Appeals cites no *Younger* case permitting a federal court or a federal plaintiff to characterize the "primary aim" of a sovereign's State court suit.

Moreover, *NOPSI* directs federal courts not to focus "narrowly" on "outcomes." The Court of Appeals simply and erroneously ignored this admonition by focusing on the

money damages aspect of the State's action. The fact that the State's action seeks a great deal of money damages (damages commensurate with the damage inflicted and the culpability of conduct) is immaterial. The State of Illinois in *Trainor v. Hernandez*, 431 U.S. 434 (1977), sought only money damages, however. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), too concerned only money damages, and only private parties.

Hood v. Commissioner of Agriculture, 764 F. Supp. 662 (D. Me. 1991), is illustrative of a proper *Younger* analysis. *Hood* involved an enforcement action by the state commissioner of agriculture to collect money a milk dealer owed to a state "milk pool." The dealer countered with a federal suit, claiming the state's action violated the federal constitution. In response to the State's abstention argument, the milk dealer claimed that the state suit was merely a "collection action," thus implicating no important state interest. In entering a *Younger* dismissal and rejecting the dealer's characterization, the court noted that "*Pennzoil* and *Trainor* could, by Hood's diminutive characterization, be reduced to mere collection actions. To the contrary, however, both involved important state interests." *Id.* at 670. The Court went on to observe, correctly, that in "determining whether the State's interest is important enough to warrant abstention, . . . the focus is not on the state's immediate interest in the outcome of the specific suit in question, but on a state's overall interest in enforcing or reviewing actions affecting the interests governed by the applicable state statute or regulation." *Id.* The Court therefore refused to confine its focus "to whether Maine has a right to collect the sum of money" Hood allegedly owed. *Id.* "Rather, the question is, more broadly, whether Maine has a right to enforce and collect payments from parties under the Maine

milk laws in order to protect the important interests of the state for which those laws were designed." *Id.*

Similarly in this case, the focus should be not upon the sum of money that the State of Connecticut demands, or, as *NOPSI* referred to it, "the outcome." Rather, the focus for *Younger* purposes should properly be on the important interests that Connecticut seeks to protect, and which the laws upon which the State relies were designed to protect.[6/]

III. UNDER THE *YOUNGER* DOCTRINE, CONNECTICUT'S STATE COURT ACTION CLEARLY SEEKS TO VINDICATE SEVERAL IMPORTANT STATE INTERESTS.

The State's action in fact has several aims, and cannot be categorized as simply as the Court of Appeals suggested. Specifically, the State's action implicates state interests in protecting trade and commerce by preventing deceptive, unfair and/or anti-competitive trade practices, in protecting the welfare of minors and all State residents, and in preserving the public assistance programs' fiscal integrity. The importance of these interests to the State is illustrated by the Connecticut General Assembly's grant of pervasive civil investigative and enforcement powers to the

[6/] Finally, the Court of Appeals also adopted wholesale the tobacco companies' claim that their federal action seeks only to interfere with the part of the State's suit claiming recovery of Medicaid and other health care costs. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 106 n.2 (2d Cir. 1997). Their prayer for relief in this action is much more sweeping and directly contradicts this characterization. (JA A-38 to A-41) Further, there is no precedent to support parsing the State's claims for relief and challenging a portion of them in a federal injunctive action to avoid *Younger* abstention. To the contrary, *NOPSI* instructs courts to look to "the importance of the generic proceedings to the State."

Commissioner of Consumer Protection and Attorney General to safeguard these interests. The Court of Appeals' holding that the State's action does not involve an important state interest is inconsistent with a number of this Court's precedents.

1. Preventing Deceptive, Unfair and Anti-competitive Business Practices - The State's Complaint alleges that the tobacco companies have engaged in unfair and deceptive as well as anti-competitive trade practices through their conspiratorial campaign to misrepresent and conceal from Connecticut consumers the negative health consequences of tobacco use and the addictive nature of nicotine -- misrepresentations and concealments designed to enhance sales of their tobacco products. The General Assembly's grant of broad and express civil police power to the State's Commissioner of Consumer Protection and Attorney General clearly demonstrates the importance it places on preserving unfettered and fully-informed trade and commerce. *See* Conn. Gen. Stat. §§ 35-32(c); 42-110d(d) & (e); 42-110m.

Similarly, this Court has long recognized the regulation of trade and commerce as fundamental and traditional areas of state activity. *See California v. Arc America Corp.*, 490 U.S. 93, 101 (1989) ("state common-law and statutory remedies against monopolies and unfair business practices" among the "historic police powers of the States"). Thus, the regulation of business conduct is a sufficiently important state interest to invoke *Younger* abstention. *See, e.g., Middlesex County Ethics Comm.*, 457 U.S. 457, 434 (1982) (regulating conduct of lawyers).

2. Protecting the Welfare of Minors - As alleged in Connnecticut's state court action, because of the tobacco companies' aggressive advertising directed at children, more than 30% of all Connecticut high school students smoke and

about 90% of all smokers began smoking before reaching the age of majority. Protecting the welfare of Connecticut's infants and minors clearly implicates an area of undisputed State governmental *parens patriae* responsibility. *In re Valerie D.*, 223 Conn. 492, 613 A.2d 748 (1992); *see Moore v. Sims*, 442 U.S. 415, 423 (1979). The State's civil enforcement action seeks to prevent the tobacco companies from continuing to market aggressively to minors, plainly implicating Connecticut's interest in securing compliance with its criminal laws. *See* Conn. Gen. Stat. § 53-344 (prohibiting sales or delivery of tobacco products to minors); *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 875 P.2d 73, *cert. denied*, 115 S.Ct. 577 (1994).

3. Protecting the Fiscal Integrity of the State and Its Programs - The Supreme Court has held that a "civil enforcement action. . . brought by the State in its sovereign capacity" to "vindicate . . . the fiscal integrity" of "its public assistance programs" is an interest vital enough to require *Younger* abstention. *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); *accord Moore v. Sims*, 442 U.S. 415, 423 (1979). Connecticut's state court action plainly implicates the fiscal integrity of its public assistance programs.[7/]

[7/] Like Illinois did in *Trainor*, the State's Complaint alleges harm to the fiscal integrity of it general assistance programs. Namely, the State has been required to expend hundreds of millions of dollars for tobacco-related illnesses as a result of the tobacco defendants' unfair, deceptive and anti-competitive business practices. The Court of Appeals distinguished *Trainor* on the ground that in "safeguarding the fiscal integrity of [its public assistance] programs" in that case, the State of Illinois sought to vindicate some of the same interests it might have elected to pursue criminally. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 107 (2d Cir. 1997). The Court stated: "The instant case does not involve a threat to the 'fiscal integrity' of Connecticut's Medicaid program because no fraud has been committed against that program." *Id.*

By ignoring these obvious and important State interests, and instead placing a different characterization on the State's action, one that focused on "outcomes" rather than the "importance of the generic proceedings," the Court of Appeals has made innumerable State enforcement actions liable to federal preemptive lawsuits such as this in the future. *See* § II, *supra*.

Finally, the extreme importance of these interests is particularly underscored by the proposed national settlement now pending before the Congress. This settlement contains many of the remedial initiatives that the State of Connecticut's lawsuit demands by way of relief in its state court action, including:

- Requiring tobacco manufacturers to disclose all previously non-public internal laboratory research and all new internal laboratory research generated in the future relating to the health effects or safety of their products;
- Establishing funds from tobacco industry payments for education-oriented counter-advertising and tobacco control campaigns, health benefits programs and smoking cessation programs;
- A ban on all outdoor tobacco advertising and elimination of cartoon characters and human

---

Trainor, of course, does not hold that to vindicate an important state interest the state *must* be acting "in aid of and closely related to criminal statutes." *Accord Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (*Younger* appropriate although no criminally related statutes at issue). Further, the State of Connecticut seeks not only to recoup those increased expenditures (just as the State of Illinois did in *Trainor*), but to enjoin the defendants' wrongful conduct, in part to reduce future wrongful increases occasioned by defendants' conduct.

figures such as *Joe Camel* and the *Marlboro Man* in tobacco advertisements;

- Subjecting the tobacco industry to severe financial surcharges if underage tobacco use does not decline radically over the next decade in order to ensure best efforts to decrease underage tobacco use.

These proposals, which obviously manifest a significant national interest, clearly support a conclusion that the state court action implicates several important state interests for purposes of *Younger*.

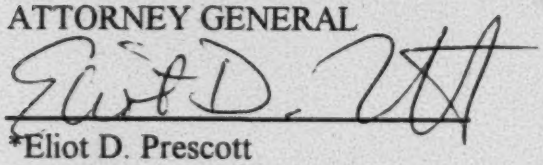
CONCLUSION

Younger v. Harris, 401 U.S. 37, 43-44 (1971). The Court of Appeals below looked narrowly at one of the "outcomes" the State seeks (money damages), rather than broadly, or "generically," at the important interests the proceeding seeks to vindicate by seeking that outcome and others. The Court mischaracterized the State's action by labeling it a mere claim for money damages, and departed from *NOPSI* by focusing only on that aspect of relief. In ignoring the public health interests implicated by this case nationally and in Connecticut, the Court of Appeals failed to *Younger* principles properly. This Court should therefore grant this petition.

Respectfully submitted,

PETITIONER

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT
Petitioners

v.

PHILIP MORRIS, ET AL.
Respondents

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE

40 FOLEY SQUARE

NEW YORK 10007

GEORGE LANGE III

CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 24th day of November one thousand nine hundred and ninety-seven.

UNITED STATES COURT OF APPEALS

FILED

NOV 24 1997

GEORGE LANGE III CLERK

Philip Morris, Inc.

Plaintiff-Appellant

v.

Dkt No: 97-7122

Blumenthal,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee Blumenthal.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, CLERK

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1904 - August Term, 1996

(Argued: June 26, 1997 Decided: September 12, 1997)
Docket No. 97-7122

PHILIP MORRIS, INC.; RJ Reynolds Tobacco Co.; Brown & Williamson Tobacco Corporation, USA; Lorillard Tobacco Co.,

Plaintiffs-Appellants,

v.

Richard BLUMENTHAL, Attorney General,

Defendant-Appellee.

Before:

MINER, MCLAUGHLIN AND JACOBS.

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the District of Connecticut (Dorsey, C.J.) on an order granting defendant's renewed motion to dismiss plaintiffs' federal action pursuant to the *Younger* abstention doctrine, the court having found that important state

interests were implicated in defendant's state action to enjoin the future sale of cigarettes and to recover damages related to the past and present sale of cigarettes.

Reversed and remanded.

PETER C. HEIN, Wachtell, Lipton, Rosen & Katz, New York City (William R. Murphy, Ben A. Solnit, Tyler Cooper & Alcorn, New Haven, CT, Donald B. Ayer, Jones, Day, Reavis & Pogue, Washington, DC, Edward F. Hennessey, III, David Thomas Ryan, Robinson & Cole, Hartford, CT, David M. Bernick, P.C., Marjorie Press Lindblom, Andrew R. McGaan, Kirkland & Ellis, Chicago, IL, Francis H. Morrison, III, James H. Rotondo, Day, Berry & Howard, Hartford, CT, Gene E. Voigts, John C. Monica, Shook, Hardy & Bacon, LLP, James R. Fogarty, Andrew P. Nemiroff, Lawrence F. Reilly, Epstein Fogarty Cohen & Selby LLC, Greenwich, CT, of counsel), *for Plaintiffs-Appellants*.

RICHARD BLUMENTHAL, Attorney General, Hartford, CT (David S. Golub, Jonathan M. Levine, Silver Golub & Teitell, LLP, Stamford, CT, Gregory T. D'Auria, Assistant Attorney General, Hartford, CT, of counsel), for *Defendant-Appellee*.

MINER, Circuit Judge:

Plaintiffs-appellants Philip Morris, Inc., RJ Reynolds Tobacco Co., Brown & Williamson Tobacco Corporation,

USA, and Lorillard Tobacco Co. (the "Tobacco Companies"), appeal from a judgment entered in the United States District Court for the District of Connecticut (Dorsey, C.J.) on an order granting the renewed motion of defendant-appellee Richard Blumenthal, the Attorney General of the State of Connecticut (the "Attorney General" or the "state"), to dismiss the Tobacco Companies' federal action pursuant to the *Younger* abstention doctrine. The district court found that abstention was appropriate because, *inter alia*, important state interests were implicated in the state's lawsuit seeking injunctive relief and monetary damages for violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. Ann. § 42-110a *et seq.* (West 1992), the Connecticut Antitrust Act, Conn. Gen. Stat. Ann. § 35-24 *et seq.* (West 1987 & Supp.1997), and state common law.

For the reasons that follow, we reverse and remand.

BACKGROUND

The action giving rise to this appeal was initiated in response to various well-publicized threats by the Attorney General to commence an action in state court against companies in the tobacco industry. According to the Attorney General, that action would seek to recover millions of dollars paid out by Connecticut under its Medicaid and general medical assistance programs for tobacco-related illnesses. In 1995, the Attorney General attempted to obtain legislative authorization for a lawsuit against tobacco companies. The Connecticut General Assembly declined to enact legislation authorizing such a suit. The Attorney General again sought authorization in March of 1996, which again was denied by the General Assembly. Notwithstanding the General

Assembly's denial of authorization, the Attorney General made clear through the press that he intended to proceed with the legal action.

On June 28, 1996, the Tobacco Companies commenced the instant action to enjoin the state from filing the impending suit in state court (the "federal action"). In their complaint, the Tobacco Companies asserted that "[t]he Threatened Lawsuit seeks to impose upon [the Tobacco Companies] on a retroactive basis massive costs of the Medicaid program that Connecticut has voluntarily chosen to establish, irrespective of traditional principles of law governing the rights and duties of [the Tobacco Companies] with respect to any actual Medicaid recipient." (Compl.¶ 16.) The Tobacco Companies challenged on constitutional grounds aspects of the relief that the state intended to pursue.[1/] In particular, they challenged the recovery of Medicaid payments made by Connecticut in connection with illnesses that allegedly are tobacco-related, and they sought to resolve questions about the consequences of their continuing to do business in Connecticut during the pendency of the threatened suit.

Three weeks after the initiation of the federal action, the state filed suit in Connecticut Superior Court against the Tobacco Companies and six other tobacco-related companies and organizations (the "state action"), seeking damages

[1/] The Tobacco Companies asserted in their complaint that the state's lawsuit and interpretation of Connecticut law unconstitutionally burden interstate commerce and violate the Tobacco Companies' rights under the Due Process Clause, Equal Protection Clause, Takings Clause, Supremacy Clause, and First Amendment. They sought a declaration that provisions of Connecticut law, as construed by the state, are unconstitutional.

and injunctive relief for alleged violations of the state antitrust law, CUTPA and state common law. The state alleged, *inter alia*, that the tobacco companies had engaged in unfair, deceptive and anti-competitive trade practices to promote the sale of their product, including (1) a campaign to misrepresent and conceal the ill effects and addictive nature of tobacco use, (2) the manipulation of nicotine levels, (3) the failure to develop a less harmful product and (4) the purposeful marketing to children.

The state sought a number of remedies, including a permanent injunction enjoining the companies from continuing their alleged unfair practices; monetary relief under a variety of theories, including recovery of Connecticut's past and future expenditures for tobacco-related health-care costs under Medicaid and a variety of other programs; and civil penalties under CUTPA and the state antitrust laws. The state also sought the disgorgement of all profits attained through the companies' unfair or deceptive trade practices.

The Tobacco Companies removed the state action to federal court pursuant to 28 U.S.C. § 1441. The state argued that removal was improper due to a lack of subject matter jurisdiction. It then moved to dismiss the federal action on the basis of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and to remand the state action to the state court. The motion to dismiss the federal action was denied without prejudice pending a determination in the removed state action on the issue of subject matter jurisdiction. On October 9, 1996, the state action was remanded to state court for lack of subject matter jurisdiction. The state then renewed its motion to dismiss the federal action.

The Tobacco Companies argued that *Younger* abstention was inappropriate in this case and that, if the district court were inclined to abstain, it should do so under the *Pullman* abstention doctrine, see *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941). The district court found that *Younger* abstention was proper and declined to address the applicability of *Pullman*. Accordingly, on December 23, 1996, the district court granted the state's renewed motion to dismiss. Judgment was entered on December 27, 1996. This appeal followed.

DISCUSSION

We have been counseled frequently by the Supreme Court "that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, --- U.S. ----, ----, 116 S.Ct. 1712, 1720, 135 L.Ed.2d 1 (1996). "Abdication of the obligation to decide cases can be justified under [the doctrine of abstention] only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1243, 47 L.Ed.2d 483 (1976) (quotation omitted).

The state argues that the instant case provides such "exceptional circumstances," and urges abstention under the > Younger doctrine. Under *Younger*, federal courts may "refrain from hearing cases that would interfere with a pending state criminal proceeding or with certain types of state civil proceedings," *Quackenbush*, --- U.S. at ----, 116 S.Ct. at 1721 (citation omitted), such as civil enforcement proceedings, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604, 95

S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975), and proceedings related to the integrity or administration of the state judicial system, see, e.g., *Juidice v. Vail*, 430 U.S. 327, 334-35, 97 S.Ct. 1211, 1216-17, 51 L.Ed.2d 376 (1977) (civil contempt). We have found *Younger* abstention appropriate where "1) there is an ongoing state proceeding; 2) an important state interest is implicated; and 3) the plaintiff has an avenue open for review of constitutional claims in the state court." *Hansel v. Town Court*, 56 F.3d 391, 393 (2d Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 572, 133 L.Ed.2d 496 (1995).

There is little question that there is an ongoing state proceeding and that the Tobacco Companies could obtain meaningful review of their federal claims in the state action. However, we do not find that the federal action implicates an important state interest within the meaning of *Younger*.

In determining whether the "important state interest" requirement has been met, we consider whether the state action concerns the central sovereign functions of state government such that "exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11, 107 S.Ct. 1519, 1525, 95 L.Ed.2d 1 (1987). "[W]e do not look narrowly to [the State's] interest in the outcome of the particular case," but rather look to "the importance of the generic proceedings to the State." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 365, 109 S.Ct. 2506, 2516, 105 L.Ed.2d 298 (1989). The burden is on the state to establish that an important state interest is implicated. See *Trainor v. Hernandez*, 431 U.S. 434, 448, 97 S.Ct. 1911, 1920, 52 L.Ed.2d 486 (1977) (Blackmun, J., concurring).

In order to ascertain the "generic proceeding" involved in the action brought by the state, we cannot focus solely or chiefly upon the style of the state's pleading, such as the particular causes of action pleaded or statutes invoked. We must consider the underlying nature of the state proceeding on which the federal lawsuit would impinge. For example, in *Pennzoil*, the Supreme Court analogized the bond-posting requirement sought to be enjoined in that case to the state contempt process at issue in *Juidice*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376, and described both of those challenged state proceedings as "processes by which the State compels compliance with the judgments of its courts." 481 U.S. at 13-14, 107 S.Ct. at 1527-28.

In the instant case, the Tobacco Companies seek a federal court injunction prohibiting the state from collecting from them monies expended by the state for treatment of smoking-related illnesses.[2/] Although the state pleads its action in state court as an enforcement action pursuant to CUTPA and the state antitrust law to prevent deception and unfair and anticompetitive business practices--arguably important state interests--the underlying claim is more accurately classified as a subrogation action grounded in tort. See *Philip Morris Inc. v. Harshbarger*, 946 F.Supp. 1067, 1077 (D.Mass.1996). Notwithstanding certain other claims,

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[2/] The state disputes that the Tobacco Companies' suit is limited to enjoining the recovery of money expended on Medicaid and other health care costs, because the complaint asks the federal court to enjoin the state "from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit." (Compl.¶ E.) However, read in context, it seems clear that the Tobacco Companies are urging the district court to enjoin on constitutional grounds an action for monetary relief.

the primary aim of the state is to obtain reimbursement from the tobacco industry for expenditures caused by its allegedly tortious conduct. This purpose has little to do with eradicating unfair trade practices or anticompetitive business practices. See, e.g., *Witham v. ITT Hartford*, No. CV 960132891, 1997 WL 325443, at *1 (Conn.Super.Ct. June 4, 1997) (purpose of CUTPA is to protect consumers from unfair trade practices). A subrogation claim grounded in tort is not a generic proceeding of great importance to the state.

Moreover, as essentially a suit for money damages, it is evident that the state action cannot be characterized accurately as a "sovereign enforcement proceeding." The monetary relief sought by the state also would be available to a private citizen.[3/] Connecticut General Statutes § 42-110g provides that any private party may seek to recover actual damages suffered as a result of alleged CUTPA violations (as the state seeks to do in the instant action) and, in its discretion, the court may also award the private party punitive damages and equitable relief. Similarly, while the state is empowered under Connecticut General Statutes § 35-32 to bring actions in the name of the state or as parens patriae for violations of the state antitrust laws, and is entitled to recover treble damages, Connecticut General Statutes § 35-35 also entitles private parties to recover treble damages on their own behalf for antitrust violations. Thus, on its face, the state action does not appear to differ greatly

[3/] The state also seeks in the state action to recover civil penalties under CUTPA, see Conn. Gen. Stat. Ann. § 42-110o(b) (West Supp.1997), and the state antitrust law, see Conn. Gen. Stat. Ann. § 35-38 (West 1987). However, these claims do not affect the nature of the state action, which primarily is to seek reimbursement of health care expenditures.

from a private action under CUTPA, and the mere fact that the state is involved as a party does not transform the action into a "sovereign enforcement" proceeding. See *Cate v. Oldham*, 707 F.2d 1176, 1183 (11th Cir.1983); see also *Moore v. Sims*, 442 U.S. 415, 423 n. 8, 99 S.Ct. 2371, 2377 n. 8, 60 L.Ed.2d 994 (1979) (that the state is a party to an action does not itself make *Younger* abstention appropriate).

Younger The state argues that *Trainor* mandates abstention when a state seeks to recover money for one of its public assistance programs. See 431 U.S. at 444, 97 S.Ct. at 1917. However, the state action in *Trainor* differs significantly from the instant case. In *Trainor*, the appellees fraudulently concealed assets when applying for welfare benefits. The state instituted a civil action to recoup the benefit payments made to appellees. The Court found that *Younger* abstention was appropriate in that case because the state's suit was brought "to vindicate important state policies such as safeguarding the fiscal integrity of [its public assistance] programs." *Id.* Moreover, the underlying civil claim in *Trainor* sought to vindicate some of the same interests that the state might have elected to pursue in a criminal prosecution. See *id.* (plurality), 431 U.S. at 449, 97 S.Ct. at 1920(Blackmun, J., concurring); *Harshbarger*, 946 F.Supp. at 1077.

The instant case does not involve a threat to the "fiscal integrity" of Connecticut's Medicaid program because no fraud has been committed against that program. There is no suggestion that any individual who received Medicaid benefits in relation to a tobacco-related illness was not entitled to those benefits. The mere fact that conduct results in expense to a state program is not enough to bring an action to terminate that conduct within the scope of *Trainor*. Nor

can every initiative by a state to improve fiscal soundness by getting money be deemed a safeguard of "fiscal integrity." This action, like a subrogation action, primarily concerns the apportionment of loss based upon theories of tort liability--who should be responsible for paying for the injuries suffered by those who contracted tobacco-related illnesses. It bears little relation to the state's administration of its Medicaid or general assistance program and does not implicate the programs' "fiscal integrity." Therefore, *Trainor* does not compel us to abstain under the *Younger* doctrine.

CONCLUSION

For the foregoing reasons, the decision of the district court is reversed and remanded. Upon remand, the district court, in its discretion, may consider whether abstention is appropriate under the *Pullman* doctrine.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PHILIP MORRIS INC. R.R. REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CO., LORILLARD TOBACCO CO.	:	
Plaintiffs,	:	Civil No. 3:96CV1221 (PCD)
-vs-	:	
RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT,	:	
Defendant.		

RULING ON MOTION TO DISMISS

Defendant moves to dismiss under the *Younger v. Harris* abstention doctrine and pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283. For the reasons below, defendant's motion is granted.

I. BACKGROUND

Plaintiffs ("Tobacco Companies") filed suit in district court (the "present action") to enjoin defendant (the "Attorney General") from filing an impending suit in state court. Shortly after the present action was filed, the Attorney General in fact filed suit in Connecticut Superior Court. The state court action seeks damages and injunctive relief for

alleged violations of state antitrust law, state unfair trade practice law, and state common law. The Tobacco Companies removed the state court action to district court. The removed case came before the Honorable Janet Bond Arterton. The Attorney General moved to dismiss the present action and to remand the removed case to state court where originally filed, arguing that removal was improper due to a lack of subject matter jurisdiction.

The motion to dismiss the present action was denied without prejudice pending resolution of the subject matter jurisdiction issue in the removed case. On October 9, 1996, the removed case was remanded to state court for lack of subject matter jurisdiction. The Attorney General then renewed the motion to dismiss the present action.

II. ANALYSIS

A. Abstention Under Younger v. Harris

The Tobacco Companies' action raises the issue of federal court interference with pending state litigation. The Supreme Court has noted that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." Younger v. Harris, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971). Federalism requires comity, which Justice Black defined as.

a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for

lack of a better and clearer way to describe it, is referred to by many as "Our Federalism" ...

Id. at 44, 91 S.Ct. at 750. Therefore, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45, 91 S.Ct. at 751. Although Younger addressed federal actions to enjoin state criminal proceedings, the same principals of comity mandate extreme caution before enjoining certain kinds of state civil proceedings as well. See, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592, 604, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982).

Abstention under Younger is appropriate when: "1) there is an ongoing state proceeding; 2) an important state interest is implicated; and 3) the plaintiff has an avenue open for review of constitutional claims in the state court." Hansel v. Town Court for Town Of Springfield, 56 F.3d 391, 393 (2d Cir.1995). When these conditions are met, abstention is obligatory. See Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 1245 n. 22, 47 L.Ed.2d 483 (1976).

1. *Ongoing State Proceeding*

There clearly is an ongoing state proceeding in the present case. The question is whether this element requires that the state proceeding be brought before the federal action. The typical scenario, as in Younger, is that the state action came first. However, the Supreme Court has held that Younger also applies in cases where the federal action was filed

preemptively. Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

The Tobacco Companies argue that Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), not Hicks, controls. Under Steffel, federal courts need not abstain under Younger if there is no pending state proceeding, lest "the hapless plaintiff [find himself] between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." Steffel, 415 U.S. at 463, 94 S.Ct. at 1217. However, Steffel applies when there is no pending state proceeding. The Supreme Court in Hicks specifically distinguished that scenario from one in which there is a pending state proceeding which, in a race to the courthouse, happened to be filed second:

> Neither Steffel v. Thompson, 415 U.S. 452 [94 S.Ct. 1209, 39 L.Ed.2d 505] (1974), nor any other case in this Court has held that for Younger v. Harris to apply, the state criminal proceedings must be pending on the day the federal case is filed. Indeed, the issue has been left open; and we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of Younger v. Harris should apply in full force.

Hicks, 422 U.S. at 349, 95 S.Ct. at 2292 (footnote omitted).

The Tobacco Companies attempt to distinguish Hicks on several other grounds. First they argue that Hicks applies only to criminal, not civil, proceedings. This argument is without merit. As discussed above, Younger applies to certain types of civil actions. Hicks applies to civil proceedings to the same extent that Younger does.

Second, the Tobacco Companies distinguish Hicks on the grounds that the state proceedings brought in that case could only have been brought in state court, not in federal court. However, the only reason why the claims in Hicks could have been brought uniquely in state court is that they were criminal charges. The distinction therefore is irrelevant and merely rehashes the argument that Hicks only applies to state criminal proceedings. Furthermore, the cases cited do not support this argument.

Finally, the Tobacco Companies argue that "comity works both ways": Respect for federalism would have the state, not the federal, court abstain. However the only case cited, Chaulk Services v. Massachusetts Commission Against Discrimination, 70 F.3d 1361 (1st Cir.1995), must be distinguished. In Chaulk the state administrative action interfered with a federal statutory and administrative system constitutionally adopted by congress. There is no such federal administrative preemption in the present action.

Accordingly, there as an "ongoing proceeding" for Younger purposes.

2. Important State Interest

Abstention is proper under Younger in civil cases only if the proceedings implicate "important state interests." Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). Civil actions by the state which are "akin to a criminal prosecution" have been held important state interests. Huffman, 420 U.S. at 604, 95 S.Ct. at 1208 (civil enforcement of anti-obscenity laws). State enforcement of attorney disciplinary rules are another example. Middlesex, 457 U.S. 423, 102 S.Ct. 2515. Phrased more generally, important state interests include "[p]roceedings necessary for the vindication of important state policies or for the functioning of the state judicial system." Id. at 432, 102 S.Ct. at 2521.

The Attorney General's claims under the Connecticut Unfair Trade Practices Act ("CUTPA") and under Connecticut antitrust law are important state interests. Both claims are under statutory schemes which contemplate civil enforcement actions by state authorities to effect state policy. See C.G.S. § 42-110m(a) (Commissioner of Consumer Protection can ask Attorney General to sue in name of the state under CUTPA); C.G.S. § 35-32(a) ("The attorney general, in the name of the state and on behalf of the people of the state, shall enforce [the Connecticut Antitrust Act]"). These laws are mechanisms for the state to enforce its important interest in fair trade in Connecticut.

The Tobacco Companies urge following Philip Morris v. Harshbarger, 1996 WL 676807, 946 F.Supp. 1067 (D.Mass.1996). In Harshbarger Tobacco Companies also preemptively filed suit to enjoy a state court action by the Massachusetts Attorney General. The Massachusetts District Court declined to abstain under Younger because it did

not find an important state interest. The Massachusetts Attorney General's action, which sought reimbursement for Medicaid expenditures, was found to be "classically in the nature of subrogation," and accordingly not an important state interest. However, Harshbarger must be distinguished because the Massachusetts Attorney General's suit in state court did not allege violations of state unfair trade practice and antitrust law, as does the Connecticut state court action. It is therefore unnecessary to address the merits and applicability of Harshbarger, since the Attorney General's CUTPA and antitrust claims do implicate an important state interest.

The Tobacco Companies attempt to gloss over the absence of unfair trade practice and antitrust claims in the Massachusetts case by pointing out that the underlying state complaints in the two cases are "predicated on virtually identical factual allegations." Surreply Mem. at 2. This is irrelevant. The Attorney General has alleged an important state interest by invoking CUTPA and Connecticut antitrust laws, not merely by the nature of the factual allegations.

The Tobacco Companies argue that Harshbarger controls because the Massachusetts attorney general sought non-monetary relief similar to the present action, although without alleging unfair trade practice or antitrust claims. This argument misses the point. The existence of an important state interest for Younger purposes does not depend on whether the relief sought is monetary or injunctive. Rather, it depends on the nature of the claim brought in the underlying state court action. It is therefore irrelevant that similar relief was sought under different laws, since it is the claim, not the relief, which determines the existence of an important state interest. As discussed above, the Connecticut state court action's allegations constitute an important state interest.

The fact that the Tobacco Companies' complaint in the present action only seeks to enjoin state court imposition of monetary, as opposed to injunctive, relief is also irrelevant for abstention purposes. The important state interest element of Younger does not depend on the relief sought by the federal plaintiff. Nor does it turn on whether the state court action seeks monetary or injunctive relief.

Accordingly, the important state interest element of *Younger* is satisfied.

3. Avenue Of Review For Constitutional Claims In State Court

The Supreme Court has held that "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." Pennzoil v. Texaco, 481 U.S. 1, 15, 107 S.Ct. 1519, 1528, 95 L.Ed.2d 1 (1987). The Tobacco Companies do not challenge this element of Younger. Pl.'s Mem. in Opp. at 10. Since there are no doubts regarding the adequacy of the Tobacco Companies' avenue of review for constitutional claims in Connecticut state court, this element of Younger is satisfied.

B. Other Arguments Raised By The Tobacco Companies

The Tobacco Companies mischaracterize the relationship between the Younger abstention doctrine and Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which "established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions." Fenner v. Boykin, 271 U.S.

240, 243, 46 S.Ct. 492, 493, 70 L.Ed. 927 (1926). Ex Parte Young held that there is the requisite subject matter jurisdiction for such suits. Younger abstention is based on federalism, not on lack of subject matter jurisdiction. Thus when an action is brought pursuant to Ex Parte Young, but falls within the requirements of Younger and its progeny, abstention is appropriate. See Younger, 401 U.S. at 45, 91 S.Ct. at 751.

The Tobacco Companies make a puzzling argument that claims in the federal action which seek injunctions against imposition of liability for future, as opposed to past, sales of tobacco should not be barred under Younger. This argument is based on mis-cited cases and faulty logic. Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), does not stand for the proposition that ongoing state proceedings can somehow be severed for Younger purposes into past and future liability. In Wooley, there were no ongoing state proceedings at issue--only failure to seek state appellate review of prior convictions under the same law (covering up New Hampshire's "Live Free or Die" motto on a car license plate). Wooley is thus irrelevant.

There is furthermore no logical base to this argument. Nothing indicates that the state court would take the unprecedented step of imposing liability for sales which have not yet occurred. The outcome of the state litigation, whatever that may be, will affect future liabilities under the familiar doctrine of res judicata. Injunctions are always prospective. But these truisms have no bearing on Younger abstention.

The Tobacco Companies also argue that abstention analysis in this case should be governed by Pullman, not Younger, abstention. See R.R. Comm'n of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

However, these doctrines are not mutually exclusive. Since abstention is appropriate under Younger, as discussed above, Pullman analysis is thus unnecessary.

III. CONCLUSION

Defendant's renewed motion to dismiss (doc 44), dated October 10, 1996, is **granted**.

SO ORDERED.

Dated at New Haven, Connecticut, December 23, 1996.

s/ Peter C. Dorsey
Peter C. Dorsey
Chief United States District Judge

RETURN DATE: AUGUST 13, 1996	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT OF
	: STAMFORD/NORWALK
v.	
PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES P.L.C.; LORILLARD TOBACCO COMPANY; LIGGETT GROUP, INC.; UNITED STATES TOBACCO COMPANY; HILL AND KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - U.S.A. INC.; and THE TOBACCO INSTITUTE, INC.	: AT STAMFORD
	: JULY 18, 1996

COMPLAINT

The State of Connecticut, by its Attorney General Richard Blumenthal, brings this action to obtain monetary, injunctive and other equitable relief, and complains and alleges as follows:

I. NATURE OF THE ACTION

1. For years, and continuing to date, the major manufacturers of tobacco products and their agents have engaged in a conspiracy to mislead, deceive and confuse the State of Connecticut and its residents regarding the evidence that the use of tobacco products causes debilitating and fatal disease and that the nicotine in tobacco products is a powerfully addictive substance. Although these manufacturers promised the Connecticut public that they would lead the effort to discover and disclose the truth about tobacco products and health, they have, in fact, systematically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health

consequences caused by their products. The tobacco companies have taken these actions, even though they have known for years, based on their own secret research, that their products often injure or kill the consumer when used exactly as intended.

2. The major manufacturers of tobacco products and the other defendants have known for decades, on the basis of their own long-concealed research, that nicotine is addictive. At the same time, at least certain tobacco companies have developed sophisticated techniques to manipulate the amount of nicotine delivered by their tobacco products to the users so as to create and sustain addiction. Yet publicly they have denied, and continue to deny, that nicotine is addictive and that they manipulate the nicotine delivery of tobacco products.

3. The tobacco companies and the other defendants are engaged in this course of conduct despite their knowledge that the vast majority of new users of tobacco products are children and adolescents. Each year, these companies spend millions of dollars on marketing and public relations in Connecticut to attract children and adolescents, with the effect that each year, more Connecticut children and adolescents begin using and continue to use tobacco products. The Centers for Disease Control and Prevention ("CDC") has reported that almost 90% of all smokers start before the age of eighteen. Every day more than 3,000 American teenagers begin smoking Surveys show that in Connecticut, 28.5% of high school males and 35% of high school females smoke, and as many as 15.5% of male high school students use smokeless tobacco. The CDC has determined that, nationwide, 11.9% of all males between the ages of 12 and 17 use smokeless tobacco products. The tobacco companies direct their products at children and

adolescents, who cannot legally purchase them, as a central part of the manufacturers' business strategy.

4. Thousands of Connecticut residents die each year from using the defendants' tobacco products. The State of Connecticut is required to spend millions of dollars annually to purchase or provide medical and related services for Connecticut residents suffering from tobacco-related diseases. At the same time the manufacturers of tobacco products reap huge profits from the sale of tobacco products in Connecticut.

5. The State of Connecticut has a long-standing policy of preventing minors from using tobacco products and of preventing anyone from facilitating minors' access to or desire for such products. It is a crime in Connecticut to "sell, give or deliver to any minor under 18 years of age tobacco in any form."

6. The State of Connecticut has a nearly 350 year-old public policy to pay from the public fisc the health care costs of its needy residents, a public policy that has long predated defendants' marketing and sale of tobacco products in Connecticut. Since 1650, the year of the earliest recorded code of Connecticut, the colonial and state legislative bodies have undertaken to pay these health care costs. In the past ten years alone, the State of Connecticut has spent over $13 billion in health care costs for its needy residents. Since the earliest days of this state policy, the State of Connecticut also has had a policy of recovering those costs from those who should have paid such costs.

II. THE PARTIES

A. THE PLAINTIFF

7. The State of Connecticut, by its Attorney General Richard Blumenthal, brings this action on its own

behalf, on behalf of its Commissioners and agencies, including the Commissioner of the Department of Social Services, and as parens patriae, on behalf of residents of the State of Connecticut. This action is brought pursuant to the authority granted, inter alia, by Connecticut common law, Conn. Gen. Stat. §§ 3-125, 42-110m, 35-32 and 33-301. Claims herein pursuant to the Connecticut Unfair Trade Practices Act are brought at the request of the Commissioner of Consumer Protection of the State of Connecticut.

8. The State of Connecticut brings this action to obtain monetary, injunctive and other equitable relief. The State of Connecticut seeks to prevent continued violations of law and duties by the defendants, to cause disgorgement of defendants' tobacco-related profits and gains and to recover actual and punitive damages on its own behalf and on behalf of its residents, including, inter alia, the damages to its general economy caused by the use of tobacco products. These damages include, inter alia, past and future expenditures for medical assistance provided under Connecticut's Medicaid program pursuant to Conn. Gen. Stat. § 17b-260 et seq.; medical assistance provided under the General Assistance Medical Assistance Program pursuant to Conn. Gen. Stat. § 17b-220 et seq.; the costs, both medical and non-medical, of caring for persons with tobacco-related illnesses who receive services through hospitals, health care facilities, residential facilities and other similar facilities owned, operated or maintained by the State of Connecticut or facilities under contract to the State to render similar services; and health care benefits for State of Connecticut employees and retirees, including sick leave and the provision of health insurance.

B. THE DEFENDANTS

9. Philip Morris Incorporated ("Philip Morris") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, New York 10017. Among other things, Philip Morris manufactures and distributes, or during times relevant herein manufactured and distributed, tobacco products under the brand names of Marlboro, Virginia Slims, Merit, Benson & Hedges, Cambridge, Saratoga and Parliament.

10. R.J. Reynolds Tobacco Company ("RJR") is a New Jersey corporation with its principal place of business at North Main Street, Winston-Salem, North Carolina 27102. Among other things, RJR manufactures and distributes, or during times relevant herein manufactured and distributed, tobacco products under the brand names of Camel, Winston, Salem, Vantage, Doral and Now.

11. Brown & Williamson Tobacco Corporation ("Brown & Williamson") is a Delaware corporation with its principal place of business at 1500 Brown & Williamson Tower, Louisville, Kentucky 40202. The American Tobacco Company ("ATC") was purchased by Brown & Williamson (or its parent or affiliate) and merged into Brown & Williamson, and Brown & Williamson has succeeded to the liabilities of ATC. Among other things, Brown & Williamson manufactures and distributes, or during times relevant herein Brown & Williamson or ATC manufactured and distributed, tobacco products under the brand names of Kool, Belair, Raleigh, Barclay, Viceroy, Lucky Strike, Pall Mall, Tareyton, and Bull Durham.

12. B.A.T. Industries P.L.C. ("BAT") is a British corporation with its principal place of business at Windsor House, 50 Victoria St., London. Through a succession of intermediary corporations and holding companies, BAT is

the sole shareholder of Brown & Williamson. Through Brown & Williamson, BAT has placed tobacco products into the stream of commerce with the expectation that substantial sales of tobacco products would be made in the United States and in Connecticut. BAT has also conducted, or through its agents, subsidiaries, associated companies, and/or co-conspirators, conducted significant research for Brown & Williamson on the topics of smoking, disease and addiction. Brown & Williamson also sent to England research conducted in the United States on the topics of smoking, disease and addiction in order to remove sensitive and inculpatory documents from United States jurisdiction, and such documents were and are subject to BAT's control. BAT is a participant in the conspiracy described herein and has caused harm in Connecticut.

13. Lorillard Tobacco Company ("Lorillard") is a Delaware corporation with its principal place of business located at 1 Park Avenue, New York, New York 10016. Lorillard is a successor to P. Lorillard Company. Among other things, Lorillard manufactures and distributes, or during times relevant herein manufactured and distributed, tobacco products under the brand names of Old Gold, Kent, Newport and True.

14. Liggett Group, Inc. ("Liggett") is a Delaware corporation with its principal place of business at 700 West Main Street, Durham, North Carolina 27702. Among other things, Liggett manufactures and distributes, or during times relevant herein manufactured and distributed, tobacco products under the brand names of L&M, Chesterfield, Eve, Lark and Dorado.

15. United States Tobacco Company ("US Tobacco") is a Delaware corporation with its principal place of business located at 100 West Putnam Avenue, Greenwich, Connecticut 06830. Among other things, US Tobacco now

manufactures and distributes smokeless tobacco products under the brand names of Happy Days, Skoal and Copenhagen. US Tobacco is the principal manufacturer of smokeless tobacco products in the United States. During times relevant herein, US Tobacco also manufactured and distributed cigarettes.

16. Hill and Knowlton, Inc. ("Hill and Knowlton") is a New Jersey corporation with its principal place of business located at 420 Washington Avenue, New York, New York.

17. The Council for Tobacco Research - U.S.A., Inc. ("CTR"), successor in interest to the Tobacco Industry Research Committee ("TIRC"), is a non-profit corporation organized under the laws of the State of New York with its principal place of business at 900 3rd Avenue, New York, New York 10022.

18. The Tobacco Institute, Inc. ("Tobacco Institute") is a corporation organized under the laws of the State of New York with its principal place of business at 1875 I Street N.W., Suite 800, Washington, D.C. 20006.

19. As used in this Complaint, the term "defendant" includes all predecessor and successor entities to the named defendants.

20. Philip Morris, RJR, Brown & Williamson (including ATC), BAT, Lorillard, Liggett and US Tobacco are referred to in this Complaint as the "tobacco companies."

21. As used in this Complaint, the term "tobacco products" refers to cigarettes and non-smoking tobacco such as chewing tobacco and snuff. Non-smoking tobacco is sometimes referred to herein as "smokeless tobacco."

22. At all relevant times, the tobacco companies together controlled virtually 100% of the tobacco products markets in Connecticut and in the United States.

23. The claims against all defendants arise out of contracts to be performed in whole or in part in the State of Connecticut; business solicited in the State of Connecticut; the production, manufacture and/or distribution of goods by the defendants with the reasonable expectation that the goods would be used or consumed in the State of Connecticut; the production, manufacture and/or distribution of goods by the defendants that were used or consumed in the State of Connecticut; and tortious conduct by the defendants in or having an effect in the State of Connecticut.

III. NATURE OF DEFENDANTS' WRONGFUL CONDUCT AND CONSPIRACY

A. IN GENERAL

24. This action arises out of an ongoing course of wrongful conduct by each defendant individually and in conspiracy with each other.

25. Defendants have pursued a course of conduct and conspiracy of deceit and misrepresentation against the public in order to promote and maintain sales of tobacco products, and the profits derived therefrom, to shield themselves from having to pay the health care costs of tobacco-related diseases and to shift those costs to others, such as the State of Connecticut.

26. The means by which the defendants have carried out their conspiracy are twofold: first, they agreed to represent falsely to the public that they were creating a new, unbiased and therefore trustworthy source to answer questions about smoking and health, and second, they counted on the public's acceptance of their representations of such trustworthiness to misrepresent, suppress, distort and confuse the facts about the health dangers of tobacco products, including nicotine addiction. The tobacco companies set their plan in motion by creating a joint industry research

organization in 1954. Since that time, they have used the credibility gained by false claims of disinterested industry-funded research to misrepresent the material facts to the public. Although knowing of the serious health dangers inherent in the use of their products and the addictive nature of their products, the defendants have utilized the above scheme to further their fallacious arguments that there is insufficient "objective" research to determine if use of tobacco products causes disease and death, and that tobacco products are not addictive.

27. The two interconnected strategies of misrepresenting their objectivity to gain credibility, and using that credibility better to deceive the public about smoking and health, have been repeated consistently for more than four decades. Defendants have engaged in a continuous conspiracy to deceive the public regarding facts material to the decision to purchase tobacco products.

28. Moreover, as internal industry research confirmed the dangers of using tobacco products and addiction, the defendants' deception rose to a new level: although promising the public that they would make full disclosure of the results of their research, defendants concealed their own negative health and addiction research results from both the public and public health officials. These research results have still not been voluntarily released.

29. The defendants also have not disclosed to the public that the tobacco companies manipulate and control the content and delivery of nicotine in their products to create and sustain consumers' addiction to tobacco products.

30. The success of the industry's campaign of deceit and misinformation depended, in large part, on the tobacco companies acting in concert. Without the agreement of each tobacco company to suppress the truth about the

health consequences and addictive nature of using tobacco products, the deception that the joint industry research efforts were objective would be revealed, and the substantive claim that "not enough facts are known" to indict the use of tobacco products would ring hollow. The tobacco companies agreed to come together and to stay together in order to accomplish what would not have otherwise occurred -- the unified and consistent distortion of public information about the use of tobacco products, health and addiction.

31. The defendants were aware that unless they took the actions they agreed to take and subsequently took, the volume of their sales of tobacco products would substantially decrease, and accordingly the profits the tobacco companies would realize would substantially diminish. Defendants were also aware that if they were required to pay the health care costs caused by the use of their products, then the tobacco companies' profits would have been substantially decreased.

32. The non-tobacco company defendants have acted in concert with the defendant tobacco companies by implementing marketing and public relations strategies, facilities and operations to carry out the purpose and effect of the conspiracy and wrongful conduct alleged herein.

B. 1953 "BIG SCARE" AND THE JOINT INDUSTRY RESPONSE

33. In December of 1953, Dr. Ernest L. Wynder of the Sloan-Kettering Institute published the results of a study in which he painted the shaved backs of mice with cigarette smoke, providing biological evidence that cigarette smoke caused cancer. The previous year, a British researcher, Dr. Richard Doll, published a statistical analysis showing that lung cancer was more common among people who smoked and that the risk of lung cancer was directly proportional to

the number of cigarettes smoked. The widespread reporting of these studies caused what officials of the tobacco companies later called the "Big Scare."

34. The tobacco products industry responded quickly to the mounting adverse publicity of a link between use of tobacco products and cancer. The Chief Executive Officers of the leading tobacco companies met on December 15, 1953, at the Plaza Hotel in New York City. Included at that meeting were representatives of Philip Morris, RJR, Brown & Williamson, ATC, Lorillard, Liggett and US Tobacco. Also in attendance was the public relations firm of Hill and Knowlton, which was to play a central role in formulating and executing the industry response.

35. According to a Hill and Knowlton memorandum summarizing the meeting, industry executives viewed the problem as "extremely serious and worthy of drastic action." The document continues, "officials stated that salesmen in the industry are frantically alarmed and that the decline in tobacco stocks on the stock exchange market has caused grave concern .... "

36. The participants in the meeting agreed that a strong public relations response from the industry was necessary. From the beginning, the emerging research linking use of tobacco products and cancer was viewed by these defendants as a public relations problem, not a public health issue. According to the Hill and Knowlton memorandum summarizing the meeting:

> a. The Chief Executive Officers of all the leading tobacco companies, except Liggett, "agreed to go along with a public relations program on the health issue."

b. "They are also emphatic in saying that the entire activity is a long-term, continuing program, since they feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future."

c. "The current plans are for Hill and Knowlton to serve as the operating agency of the companies, hiring all the staff and disbursing all funds."

C. CREATION OF TOBACCO INDUSTRY RESEARCH COMMITTEE

37. Nine days later, Hill and Knowlton presented a detailed recommendation to the tobacco companies and others. The recommendation recognized the importance of gaining the public trust, and avoiding the appearance of bias, if the "procigarette" strategy was to be successful. According to the memorandum:

"[T]he grave nature of a number of recently highly publicized research reports on the effects of cigarette smoking . . . have [sic] confronted the industry with a serious problem of public relations.

"It is important that the industry do nothing to appear in the light of being callous to considerations of health or of belittling medical research which goes against cigarettes....

"The situation is one of extreme delicacy. There is much at stake and the industry group, in moving into the field of public relations, needs to exercise great care not to add fuel to the flames."

38. As a result of the December 15, 1953 meeting and the recommendations of Hill and Knowlton, Philip Morris, RJR, Brown & Williamson, ATC, Lorillard and US Tobacco agreed to create the Tobacco Industry Research Committee ("TIRC"). Liggett joined in 1964, the same year the Surgeon General issued his first report linking cigarette smoking to lung cancer. Also in 1964, TIRC changed its name to the Council for Tobacco Research - USA, Inc. ("CTR").

39. A second entity, the Tobacco Institute, was formed by tobacco companies in 1958 to assist in the industry's lobbying and public relations needs. Hill and Knowlton, however, continued to have substantial involvement in both TIRC and the Tobacco Institute. Hill and Knowlton's role in these organizations has been described by industry participants as: "Straddling both and acting as a buffer for each .... Hill and Knowlton decides whether questions from outside individuals or organizations are to be directed to the Tobacco Institute or the T.I.R.C. "

40. Hill and Knowlton coordinated the public relations activities of both TIRC and the Tobacco Institute. In this role, Hill and Knowlton helped forge a multi-prong industry propaganda strategy to counter the growing evidence that tobacco use causes adverse health consequences and the growing call for governmental regulation of tobacco products. At a 1963 strategy meeting of TIRC, the Tobacco Institute, Hill and Knowlton and representatives of the tobacco companies, Hill and Knowlton's role in responding to the anticipated Report of the Surgeon General was described:

> "Because Phase I [of the Surgeon General's Report] is expected to be scientific in nature, T.I.R.C. expressed the belief that it will logically be the responsive agency, with Dr.

> Little or Mr. Hartnett as spokesman and with Hill & Knowlton providing public relations guidance. By the same token, the Tobacco Institute believes that Phase II [dealing with regulatory action] will probably be its primary concern, again with Hill & Knowlton's counseling."

D. CONTROL OF TIRC BY TOBACCO COMPANIES THROUGH HILL AND KNOWLTON

41. As had been proposed at the December 15, 1953 meeting, the tobacco companies, through their agent Hill and Knowlton, operated and effectively controlled TIRC.

42. TIRC's offices were located in the Empire State Building, one floor below the Hill and Knowlton offices. Internal documents confirm that Hill and Knowlton, and not independent scientists, actually ran TIRC. A "highly confidential" internal memo reported:

> "Since the [TIRC] had no headquarters and no staff, Hill and Knowlton, Inc. was asked to provide a working staff and temporary office space. As a first organizational step, public relations counsel assigned one of its experienced executives, W.T. Hoyt, to serve as account executive and handle as one of his functions the duties of executive secretary for the [TIRC]."

43. There has been substantial staff overlap between Hill and Knowlton and TIRC (and later CTR). In 1954, 35 staff members of Hill and Knowlton worked full or part time for TIRC. In that year, TIRC, a purported research firm, paid $477,955 to Hill and Knowlton, the public relations

arm of the tobacco companies. This amount constituted over 50% of TIRC's entire operating budget.

E. THE TOBACCO COMPANIES' FALSE PROMISE TO THE PUBLIC

44. On January 4, 1954, Philip Morris, RJR, Brown & Williamson, ATC, Lorillard, US Tobacco and others announced the formation and purpose of TIRC, with a full page newspaper advertisement entitled "A Frank Statement to Cigarette Smokers." The statement appeared in 448 newspapers across the nation, reaching a circulation of 43,245,000 in 258 cities. The advertisement ran in the daily newspapers in Connecticut, including newspapers in Hartford, Waterbury, New Haven, Bridgeport and Stamford. As set forth below, this advertisement included an unambiguous pledge to the public, including the people of Connecticut and those who advance and protect the public health, that through TIRC these tobacco companies would conduct and report objective and unbiased research regarding the use of tobacco products and their effects on health.

45. The "Frank Statement to Cigarette Smokers" stated in part:

> a. "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings."
>
> b. "Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research."
>
> c. "[T]here is no proof that cigarette smoking is one of the causes [of lung cancer]."

d. "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

e. "We believe the products we make are not injurious to health."

f. "We always have and always will cooperate closely with those whose task it is to safeguard the public health."

g. "We are pledging aid and assistance to the research effort into all phases of tobacco use and health."

h. "For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as [the] TOBACCO INDUSTRY RESEARCH COMMITTEE."

i. "In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities."

j. "This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it."

46. These representations were made by these defendants for the purpose and with the effect that consumers would consider the representations material to their

decisions to purchase and use tobacco products. At that time, and continuing to the present, these defendants knew or should have known that their failure to fulfill the duty they undertook, and other conduct as alleged herein, would directly stabilize or increase the use of tobacco products. They also knew that an increase in health care costs for tobacco products users, including health care costs that would be incurred by the State of Connecticut, was the substantially certain consequence of the past and continued use of tobacco products.

47. By the spring of 1955, the self-defense propaganda strategy recommended by Hill and Knowlton and implemented by the industry through the "Frank Statement" had made steady progress towards its desired results, including securing the confidence of those to whom it was directed. Hill and Knowlton reported to TIRC:

a. "[P]rogress has been made.... The first 'big scare' continues on the wane."

b. "The research program of the [TIRC] has won wide acceptance in the scientific world as a sincere, valuable and scientific effort."

c. "Positive stories are on the ascendancy."

F. DEFENDANTS' KNOWLEDGE THAT TOBACCO PRODUCTS USE IS HARMFUL

48. In the years following the 1954 "Frank Statement," and continuing to the present, the tobacco companies have repeatedly acted in breach of their assumed duty to report objective facts on tobacco products use and health. As evidence mounted through industry research and truly independent studies that the use of tobacco products causes cancer and other diseases, defendants continued publicly to represent that the link between tobacco use and human disease was not proven, despite the fact that even their

own studies and information were to the contrary. Internally, defendants knew and acknowledged the veracity of the scientific evidence demonstrating the health hazards of using tobacco products and at the same time suppressed such evidence where they could and attacked it when it did appear.

49. Internal industry documents reveal, for example:

a. A 1956 memorandum from the Vice President of Philip Morris' Research and Development Department to top executives at the company regarding the advantages of "ventilated cigarettes" stated that: "Decreased carbon monoxide and nicotine are related to decreased harm to the circulatory system as a result of smoking .... Decreased irritation is desirable ... as a partial elimination of a potential cancer hazard."

b. A 1958 memorandum sent to the Vice President of Research at Philip Morris, who later became a member of its Board of Directors, from a company researcher stated "the evidence . . . is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors . . ."

c. A 1961 document presented to the Philip Morris Research and Development Committee by the company's Vice President of Research and Development included a section entitled "Reduction of Carcinogens in Smoke." The document stated, in part:

"To achieve this objective will require a major research effort, because

- Carcinogens are found in practically every class of compounds in smoke.

This fact prohibits complete solution of the problem by eliminating one or two classes of compounds. The best we can hope for is to reduce a particularly bad class, i.e., the polynuclear hydrocarbons, or phenols ....

- Flavor substances and carcinogenic substances come from the same classes, in many instances."

d. A 1963 memorandum to Philip Morris' President and CEO from the company's Vice President of Research describes a number of classes of compounds in cigarette smoke which are "known carcinogens." The document goes on to describe the link between smoking and bronchitis and emphysema. "Irritation problems are now receiving greater attention because of the general medical belief that irritation leads to chronic bronchitis and emphysema. These are serious diseases involving millions of people. Emphysema is often fatal either directly or through other respiratory complications. A number of experts have predicted that the cigarette industry ultimately may be in greater trouble in this area than in the lung cancer field."

e. Brown & Williamson and its parent company, BAT, researched the health effects of nicotine and were aware early on, as reported at a BAT Group Research Conference in November 1970, that "nicotine may be implicated in the aetiology [cause] of cardiovascular disease ...."

f. A 1961 "Confidential" memorandum from the consulting research firm hired by Liggett to do research for the company states:

"There are biologically active materials present in
cigarette tobacco. These are: a) cancer causing b) cancer promoting c) poisonous d) stimulating, pleasurable, and flavorful."

g. A 1963 memorandum from the Liggett consulting research firm states:

"Basically, we accept the inference of a causal relationship between the chemical properties of ingested tobacco smoke and the development of carcinoma, which is suggested by the statistical association shown in the studies of Doll and Hill, Horn, and Dorn with some reservations and qualifications and even estimate by how much the incidence of cancer may possibly be reduced if the carcinogenic matter can be diminished, by an appropriate filter, by a given percentage."

50. These internal Liggett documents sharply contrast with the information Liggett provided to the Surgeon General in 1963. Liggett withheld from the Surgeon General the views of its researchers and consultants that the evidence showed that the use of tobacco products causes human disease. Instead, the report Liggett presented to the Surgeon General focused on alternative causes of disease, such as air pollution, coffee, alcohol consumption, diet, lack of exercise and genetics. Liggett criticized the known statistical association between smoking and mortality and various diseases as "unreliably conducted" and "inadequately analyzed." The Liggett report concluded that the association between tobacco products and disease was inconclusive and that diseases generally associated with tobacco products were, in fact, due to other factors.

51. Philip Morris also concealed from the public its actual views of the research conducted outside the influence of the industry. In a 1971 memorandum, Dr. H. Wakeham, then Vice President of Research and Development, stated in referring to a recent study that found cigarette smoke inhalation caused lung cancer in beagles: "1970 might very properly be called the year of the beagle. Early in the year, the American Cancer Society announced that they had finally demonstrated the formation of lung cancer in beagles by smoke inhalation in the now infamous Auerbach and Hammond study." Although Dr. Wakeham criticized the mice cancer studies, he conceded that "the beagle test was a critical one . . . for the cigarette causation hypothesis."

52. Dr. Wakeham's memorandum demonstrates Philip Morris' approval of the industry's public dismissals of these independent studies: "The strong opposition of the industry to the beagle test is indicative of a new, more aggressive stance on the part of the industry in the smoking and health controversy. We have gone over from what I have

called the 'vigorous denial' approach, the take it on the chin and keep quiet attitude, to the strongly voiced opposition and criticism. I personally think this counter- propaganda is a better stance than the former one."

53. Similarly, BAT's internal view of the validity of mouse skin painting experiments differed markedly from the view expressed in public statements. Minutes from a 1969 BAT research conference stated "[h]istorically, bioassay experiments were undertaken by the industry with the object of clarifying the role of smoke constituents in pulmonary carcinogenesis. The most widely used of these methods [was] mouse-skin painting .... In the foreseeable future, say five years, mouse-skin painting would remain as the ultimate court of appeal on carcinogenic effects."

54. Two years later a Brown & Williamson public relations document stated that "[m]uch of the experimental work involves mouse-painting or animal smoke inhalation experiments . . . . [T]he results obtained on the skin of mice should not be extrapolated to the lung tissue of the mouse, or to any other animal species. Certainly such skin results should not be extrapolated to the human lung."

G. DEFENDANTS' REPEATED DECLARATIONS OF THEIR ASSUMED DUTY

55. The deceptions of the 1954 "Frank Statement to Cigarette Smokers" were consistently renewed and repeated by the industry. RJR Chairman Bowman Gray told Congress in 1964: "I stated that we feel, and we are on public record, that more research is needed and a great deal more research is needed. We are doing what we can in our best efforts to encourage and provide for this research." "If it is proven that cigarettes are harmful, we want to do something about it regardless of what somebody else tells us to do. And we would do our level best. It's only human."

56. Another advertisement co-sponsored by TIRC and the Tobacco Institute, on behalf of the tobacco companies, called "A Statement about Tobacco and Health," stated:

> "We recognize that we have a special responsibility to the public -- to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use. We accepted this responsibility in 1954 by establishing the TIRC, which provides research grants to independent scientists. We pledge continued support of this program of research until the facts are known. We shall continue all possible efforts to bring the facts to light."

57. Additional representations were made in 1970 when the tobacco companies, acting through the Tobacco Institute, placed a number of advertisements similar to the 1954 "Frank Statement." One advertisement stated in part:

> a. "After millions of dollars and over 20 years of research: The question about smoking and health is still a question."

> b. "In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding."

> c. "In 1954, the Industry established what is now known as CTR, the Council for Tobacco Research--USA, to provide financial support for research by independent scientists into all phases of tobacco use and

health. Completely autonomous, CTR's research activity is directed by a board of ten scientists and physicians who retain their affiliations with their respective universities and institutions. This board has full authority and responsibility for policy, development and direction of the research effort."

d. "The findings are not secret."

58. Another advertisement in 1970 stated that the industry "believes the American public is entitled to complete, authenticated information about cigarette smoking and health .... The tobacco industry recognizes and accepts a responsibility to promote the progress of independent scientific research in the field of tobacco and health."

59. In 1972, Tobacco Institute President Horace Kornegay testifying before Congress stated that "the cigarette industry is as vitally concerned or more so than any other group in determining whether cigarette smoking causes human disease .... That is why the entire tobacco industry . . . since 1954 has committed a total of $40 million for smoking and health research through grants to independent scientists and institutions."

60. In March of 1983, Sheldon Sommers, M.D., scientific director of CTR, testified before Congress that: "Cigarette smoking has not been scientifically established to be a cause of chronic diseases, such as cancer, cardiovascular disease, or emphysema. Nor has it been shown to affect pregnancy outcome adversely."

61. In 1984, RJR placed an editorial style advertisement in The New York Times stating that "[s]tudies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary."

62. In 1994, the chief executives of the tobacco companies testified under oath before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, U.S. House of Representatives, chaired by Congressman Waxman ("Waxman Subcommittee"). These executives knowingly made material misrepresentations and/or omissions to the Subcommittee about tobacco products, health and addiction, and in particular, stated that nicotine is not addictive. These statements, as with the other deceptive statements and misrepresentations cited in this Complaint, were consistent with defendants' practice of providing disinformation to the public and were made with the knowledge and intention that they would be widely disseminated to the public, and communicated to Connecticut consumers. These defendants' testimony to the Waxman Subcommittee included the following:

a. Philip Morris President and CEO William I. Campbell said, in response to what he described as "a number of charges . . . leveled against the tobacco industry generally, and Philip Morris specifically, . . . our consumers are being misled and when that happens Philip Morris has and will continue to speak out loudly and clearly. Our consumers deserve to know the truth ...." Campbell further stated that:

i. "Philip Morris does not manipulate nor independently control the level of nicotine in our products."

ii. "Cigarette smoking is not addictive."

iii. "Philip Morris research does not establish that smoking is addictive."

b. Andrew Tisch, then CEO of Lorillard, asserted that smoking does not cause cancer.

"We have looked at the data and the data that we have been able to see has all been statistical data that has not convinced me that smoking causes death."

c. RJR CEO James W. Johnston said that, "smoking is no more 'addictive' than coffee, tea or Twinkies."

d. US Tobacco's President Joseph Taddeo stated:

i. "The assertion that smokeless tobacco use can be addictive is without merit."

ii. "U.S. Tobacco does not in any way manipulate the nicotine level in its tobacco products ...."

iii. "Oral tobacco has not been established as a cause of oral cancer."

63. These continuing representations by defendants to the public about sponsoring independent objective research and bringing the truth to light were false and deceptive. The misrepresentations were made to gain the trust of the public to further defendants' scheme of distorting and suppressing substantive information about smoking and health in order to assure the continuing widespread sale and use of tobacco products.

64. Defendants' representations that their products are not addictive were made despite a substantial body of evidence, including evidence developed by the tobacco companies themselves, indicating that nicotine is not only

addictive, but is the reason why people smoke and that the primary, if not sole, function of nicotine is to provide a pharmacological effect on the smoker that leads to addiction. The tobacco companies continue to deny that nicotine is addictive and instead use various misleading euphemisms to describe the role of nicotine, such as "satisfaction," "impact," "strength," "rich aroma" and "pleasure."

H. DEFENDANTS' WRONGFUL AGREEMENT

65. This industry strategy depended for its success on joint and concerted action by the tobacco companies and the other defendants. Each of the defendants agreed not to reveal to the public the true nature of TIRC, and later CTR, and not to disclose adverse information on tobacco products use and health, in order to protect continued industry sales and profits and to prevent the manufacturers from having to pay the health care costs associated with the use of tobacco products.

66. In 1968, a memo addressed to the CEO of Liggett regarding a meeting of the research directors of the tobacco companies stated on the topic of tobacco and health "a general feeling that an industry approach as opposed to an individual company approach was highly desirable."

67. An example of the industry's united front and concerted action was demonstrated in 1977 after it was revealed that an employee of US Tobacco had stated to The New York Times that "[smokeless tobacco] presents the least possible danger of all [and] that it's when you light tobacco that you start doing damage." US Tobacco apologized to each of the cigarette companies despite the fact that the disclosure did not directly implicate its own products. US Tobacco assured the cigarette companies that the employee is "no longer employed at US Tobacco." Additionally, US Tobacco assured the other companies that it had undertaken action to prevent a similar breach by its

employees. US Tobacco instituted a program within its company to educate its employees that the industry position was to disavow any relationship between tobacco products and disease.

68. Cigarette manufacturers and smokeless tobacco manufacturers monitored each other's research to assure that their common objectives were achieved. Thus, Brown & Williamson joined the Smokeless Tobacco Council in order to make sure that research that confirmed the link between tobacco products use and adverse health consequences was not done. Brown & Williamson described its reason for joining the Smokeless Tobacco Council this way:

> "The primary purpose of such membership, however, would be to know what the Smokeless Tobacco Council is doing as a protective measure both for our interest in that product area and against the possibility that some research they do could impact on our cigarette business."

69. Each company also agreed not to perform its own independent research on use of tobacco products and health on their own. This agreement was referred to as the "gentlemans [sic] agreement." A 1968 internal Philip Morris draft memorandum entitled "Need for biological research by Philip Morris research and development," and prepared by the company's Vice President of Research and Development, states:

> "We have reason to believe that in spite of the gentlemans agreement for the tobacco industry in previous years that at least some of the major companies have been increasing biological studies with their own facilities."

70. As indicated by the 1968 "gentlemans agreement" memo, it was believed within the industry that individual companies were performing certain research on their own, in addition to the joint industry research. But the fundamental understanding and agreement remained intact: that harmful information and activities would be restrained, suppressed, and/or concealed. This included restraining, suppressing, and concealing research on the health effects of tobacco products use, including the addictive qualities of tobacco, and restraining, concealing, and suppressing the research and marketing of less hazardous tobacco products.

I. SUPPRESSION AND CONCEALMENT OF INDUSTRY-SPONSORED BIOLOGICAL RESEARCH

1. Role of CTR as a "Front"

71. In 1977, Addison Yeaman, Chairman and President of CTR, stated during a public speech that "[CTR] has no propaganda function of any kind or any degree." Internal documents demonstrate, however, that the tobacco companies' joint efforts undertaken through TIRC, and later, through CTR, were not disinterested or objective. Rather, they were designed and used to promote favorable research, to suppress negative research when possible, and to attack negative research where it could not be suppressed, all in order to convince the public that the "case against smoking is not closed."

72. A 1974 report to the CEO of Lorillard from a research executive described CTR's scientific projects as "hav[ing] not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc. Thus, it seems obvious that reviews of such programs for scientific

relevance and merit in the smoking and health field are not likely to produce high ratings."

73. A 1972 internal document from a Tobacco Institute official to the group's President described the importance of using joint industry research to maintain public doubt about the link between smoking and disease:

> "For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts -- litigation, politics, and public opinion.
>
> While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not - nor was it ever intended to be - a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of
>
> -- creating doubt about the health charge without actually denying it
>
> -- advocating the public's right to smoke, without actually urging them to take up the practice
>
> -- encouraging objective scientific research as the only way to resolve the question of the health hazard.
>
> As an industry, therefore, we are committed to an ill-defined middle ground which is articulated by variations on the theme that, 'the case is not proved.'
>
> In the cigarette controversy, the public -- especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers) -- must perceive,

understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor.

As things stand, we supply them with too little in the way of ready-made credible alternatives."

74. A 1978 memo addressed to the CTR file from a Philip Morris official characterized CTR as "an industry 'shield.'" The memorandum goes on to state:

"the 'public relations' value of CTR must be considered and continued . . . . It is extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed . . . . There is a 'CTR basket' which must be maintained for 'PR' purposes . . . ."

75. In 1993, a former 24-year employee of CTR confirmed publicly that the joint industry research efforts were not objective:

"When CTR researchers found out that cigarettes were bad and it was better not to smoke, we didn't publicize that. The CTR is just a lobbying thing. We were lobbying for cigarettes. "

76. This and other evidence demonstrates that the role and purpose of TIRC and CTR in the tobacco companies' strategy was to seek to use the public's trust to propagate "pro-tobacco" propaganda. An industry official wrote in his personal notes describing a meeting that included high level officials from various tobacco companies that:

"CTR is best & cheapest insurance the tobacco industry can buy and without it the

Industry would have to invent CTR or would be dead."

77. Nonetheless, in its annual reports published between 1985 and 1992, CTR stated that its Scientific Advisory Board funded peer-reviewed research projects "judging them solely on the basis of scientific merit and relevance." In 1994, Dr. James F. Glenn, CEO of CTR, submitted testimony to the Waxman Subcommittee that:

a. "The Council . . . sponsors research into questions of tobacco use and health and makes the results available to the public."

b. "Council grantees are assured complete scientific freedom in conducting their studies . . . Publication of research results is encouraged in all instances."

2. The Example of Dr. Homburger

78. In fact, CTR-sponsored research projects were directed away from research that might add to the evidence against the use of tobacco products. When CTR-sponsored research did produce unfavorable results the information was distorted or simply suppressed. For example, Dr. Freddy Homburger, a researcher in Cambridge, Massachusetts, undertook a study of smoke exposure on hamsters. According to Dr. Homburger, he received a grant from CTR that was changed half-way through the study to a contract "so they could control publication -- they were quite open about that." Dr. Homburger has testified that when the study was completed in 1974, the Scientific Director of CTR and a CTR lawyer "didn't want us to call anything cancer" and that they threatened Dr. Homburger with "never get[ting] a penny more" if his paper was published without deleting the word cancer.

79. An internal CTR document describes how Dr. Homburger attempted to call a press conference about the incident and how CTR stopped it:

> "He . . . was to tell the press that the tobacco industry was attempting to suppress important scientific information about the harmful effects of smoking. He was going to point specifically at CTR. . . .
>
> "I arranged later that evening for it to be canceled.
>
> "Homburger was given a cordial welcome and nicely 'hastened' out the door.
>
> "P.S. I doubt if you or Tom will want to retain this note."

3. CTR Special Projects Division

80. Another mechanism that CTR used to suppress research results that demonstrated the link between tobacco products and disease was to involve lawyers selectively, and then invoke the attorney/client or work product privilege to prevent the disclosure of harmful information. CTR used the term "special projects" to refer to projects funded by CTR that did not get approved through CTR's traditional peer review process but that were still desirable for the industry's public relations and propaganda purposes. "Special projects" were selected and monitored by industry lawyers to prevent disclosure if the results were adverse to the industry position. One Philip Morris official characterized CTR as a "front" for performing "special projects."

81. Notes prepared at a 1981 meeting of the tobacco companies' Committee of General Counsel state:

> "When we started the CTR Special Projects, the idea was that the scientific director of

> CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project. . .
>
> "[W]e were afraid of discovery for FTC and Aviado, we wanted to protect it under the lawyers. We did not want it out in the open."

4. Use of Lawyers to Further Conspiracy

82. The Kansas City law firm of Shook, Hardy & Bacon and other lawyers played a critical role in furthering the conspiracy to suppress and conceal information about the adverse health effects caused by the use of tobacco products. The lawyers' strategy was to attempt to protect damaging tobacco-related documents from disclosure under the attorney-client or work product privileges regardless of whether such documents were prepared in anticipation of litigation or represented confidential communications made between lawyer and client for the purpose of rendering legal advice. Lawyers routinely provided a number of non-legal services to the defendants such as deciding which CTR "special projects" should receive funding, dispensing funding to the "scientists" involved in such projects, and designing the scope and approach of the special project. Shook, Hardy & Bacon also undertook to coordinate the tobacco companies CTR "special projects" subterfuge.

83. For example, in 1976, Donald K. Hoel of Shook, Hardy & Bacon wrote to in-house lawyers at the various tobacco companies that a study to measure environmental tobacco smoke should be modified in such a way that so that the study would yield more favorable results for the tobacco companies' position. The study was

subsequently modified to de-emphasize the role of second-hand tobacco smoke relating to indoor environmental quality.

84. In addition, a May 19, 1981 letter from Ernest Pepples, Vice President and General Counsel of Brown & Williamson, to Patrick Sirridge of Shook, Hardy & Bacon requests that Sirridge evaluate the qualifications of various scientists seeking to conduct scientific studies for Brown & Williamson. Sirridge responded by providing biographical sketches of potential consultants including whether they previously had taken scientific position favorable to the industry's position. Sirridge also cooperated with Pepples' request in 1984 to transfer the funding of some helpful research by a cooperative scientist from a CTR account to a law firm project: "I do not think . . . that we should continue burdening CTR with such programs, and instead suggest that they be handled as law firm projects.

85. In 1972, William Shinn of Shook, Hardy & Bacon wrote to tobacco company officials that a potentially favorable study should be secretly funded by the tobacco companies as a "non-CTR special project" in order to make the study appear independent of the industry and thus heighten its perception as unbiased and reliable.

86. By becoming intimately involved in the funding and design of these scientific studies, these lawyers attempted to further the conspiracy and fraud of the tobacco companies and CTR by (1) clothing such studies in the attorney-client or work product privilege in order to protect them from disclosure if their results were unfavorable, and (2) by creating the perception that CTR and the tobacco companies were fairly and appropriately fulfilling their obligations and promises to the public that they would, in a vigorous and unbiased manner investigate and report to the public the link between their products and human disease.

87. At least one tobacco company used similar tactics in-house to suppress and avoid disclosure of its internal research on smoking and disease. At a time when the company was resisting discovery in a number of personal injury lawsuits, Brown & Williamson's general counsel, J. Kendrick Wells, recommended in a memorandum dated January 17, 1985, that much of the company's biological research be declared "deadwood" and shipped to England. He recommended that no notes, memos or lists be made about these documents. Wells stated, "I had marked certain of the document references with an X . . . which I suggested were deadwood in the behavioral and biological studies area. I said that the "B" series are "Janus" series studies and should also be considered as deadwood." ("Janus"was a name of a project that attempted to isolate and remove the harmful elements of tobacco.) Wells further recommended that the research, development and engineering department also should undertake "to remove the deadwood from the files."

88. Thus, the tobacco companies and their lawyers have misused claims of attorney/client privilege to insulate CTR-funded research projects and internal documents from disclosure to the public and to government officials. This conduct demonstrates the falsity of the tobacco companies' representations that they would jointly fund objective research and report the results of that research to the public.

J. SUPPRESSION AND CONCEALMENT OF INTERNAL BIOLOGICAL RESEARCH

1. "Mouse House Massacre"

89. In the 1960s, RJR established a facility in Winston-Salem, North Carolina, to perform research on the health effects of smoking using mice. Nicknamed the

"Mouse House," RJR scientists conducted research in a number of specific areas, including studies of the actual mechanism whereby smoking causes emphysema in the lungs.

90. Although the RJR lab made significant progress in understanding this mechanism, RJR disbanded the entire research division in one day, and fired all 26 scientists without notice.

91. Several months before the 1970 closure and firings, RJR attorneys collected dozens of research notebooks from the scientists. The notebooks have still not been disclosed. One of the researchers later stated about RJR's executives and lawyers that "they like to take the position that you can't prove harm because you don't know mechanism . . . And sitting right under their noses is evidence of mechanism[.] What are they going to do with this stuff? They decided to kill it."

92. Internally, an RJR-commissioned report favorably described the Mouse House work as "the more important of the smoking and health research effort because it comes close to determining what was thought to be the underlying pathobiology of emphysema." None of the work done at the "Mouse House" was disclosed to the public.

2. The "Safer Cigarette"

93. Several tobacco companies' biological research appears to have been directed toward developing a cigarette with reduced health risks. These companies performed research that involved dividing cigarette smoke into its different chemical constituents, or "fractions," to discover which part of the cigarette smoke caused disease. Several companies were successful in discovering which constituents in tobacco smoke were carcinogens, or were otherwise linked to

diseases. This research was kept secret and never reported to the public.

94. A number of companies also successfully removed certain harmful constituents from cigarette smoke or treated the products to decrease the harmful effects of such constituents, and developed prototype cigarettes with reduced adverse health effects. These products were never marketed.

95. A memorandum written by an attorney at Shook, Hardy & Bacon articulated the industry-wide position regarding the issue of a so-called "safer cigarette." The 1987 memorandum, referring to the marketing by RJR of a smokeless cigarette, Premier, stated that the smokeless cigarette could "have significant effects on the tobacco industry's joint defense efforts" and that "[t]he industry position has always been that there is no alternative design for a cigarette as we know them." The attorney also noted that, "unfortunately, the Reynolds announcement . . . seriously undercuts this component of the industry's defense."

96. As early as 1958, a memorandum from a Philip Morris researcher to the company's Vice President of Research and Development proposed that the company attempt to make a "safer cigarette" that could enable it to "jump on the other side of the fence . . . on the issue of tobacco smoking and health . . . ."

97. Although Philip Morris did undertake research and development of such a product, the company never released the research, and never informed the public that existing cigarettes were not safe or that a "safer cigarette" was possible. As a research and development presentation to Philip Morris' Board of Directors in 1964 stated:

> "Two years ago, in anticipation of a health crisis to be precipitated by the Smoking and

> Health Report of the Surgeon General's Committee, we undertook to develop a physiologically superior cigarette.
>
> [W]e put together a charcoal filter product with performance superior to anything in the market place. That product was known as Saratoga. Physiologically it was an outstanding cigarette. Unfortunately then after much discussion we decided not to tell the physiological story which might have appealed to a health conscious segment of the market. The product as test marketed didn't have good 'taste' and consequently was unacceptable to the public ignorant of its physiological superiority."

98. The research and development department at Philip Morris nonetheless viewed continued research into "safer cigarettes" as necessary to compete in the event that another cigarette company marketed a "safer cigarette." The presentation to the Philip Morris Board of Directors continued:

> "The Research and Development Department is working to establish a strong technological base with both defensive and offensive capabilities in the smoking and health situation. Our philosophy is not to start a war, but if war comes, we aim to fight well and to win."

(a) Liggett "Safer Cigarette": XA

99. Liggett also developed a cigarette with reduced adverse health effects. Company researchers believed that they had discovered which cigarette smoke constituents

were carcinogens, and found a way to remove them. Despite Liggett's belief that the product was commercially marketable, the company never marketed the cigarette and suppressed the research that led to its development.

100. Liggett began its research by repeating the smoke condensate painting studies of mice performed by Dr. Wynder through a contract with a consulting firm. The consulting firm confirmed Dr. Wynder's findings, and as a result, in 1968, Liggett began "a tobacco additive program designed to reduce or eliminate the tumorigenic activity of cigarette smoke."

101. By 1979, Liggett had declared the work a success. Company documents state:

> "Briefly, as a result of 20 years effort in co-operation with [the consulting firm], we have developed a cigarette system which produces smoke of reduced biological activity. . . . [T]here can be no argument that the use of the additives has resulted in a product with lower carcinogenic effects . . . ."

102. Liggett's "safer cigarette," a product called "XA," was never marketed and the XA project was abandoned. Liggett did so for two reasons. First, disclosing the feasibility of a "safer cigarette" would imply that all existing cigarettes were not safe. Second, Philip Morris apparently threatened Liggett with retaliation if Liggett violated the industry agreement not to disclose negative information on use of tobacco products and health. Liggett's Assistant Research Director, Dr. James Mold, reported that Liggett's president said that he was "told by someone in the Philip Morris Company that if we tried to market such a product that they would clobber us."

(b) Liggett, James Mold and Suppression of the XA Research

103. During the XA project, Liggett attempted to insulate the research by the use of company lawyers. According to Dr. Mold, after 1975, "all meetings that we had regarding this project were to be attended by a lawyer . . . . All paper that was generated . . . [was] to be directed to the Law Department." Dr. Mold stated that lawyers even collected all the notes after each meeting.

104. Dr. Mold stated that despite its significance, Liggett's lawyers not only ultimately succeeded in stopping the project, but ordered him not to publish the results of the research that led to the "safer cigarette." Only an abstract of the paper, modified by the legal department, was published by the consulting firm, without Dr. Mold's name.

105. When asked why Liggett never marketed the safer XA cigarette, Dr. Mold explained that:

> "[Management circles] felt that such a cigarette if put on the market would seriously indict them for having sold other types of cigarettes that didn't contain this, for example. Or that they were carrying on this biological research at the same time saying it meant nothing."

(c) Liggett "Safer Cigarette" Patent

106. Liggett had also obtained a patent for the process it had discovered to produce its "safer cigarette." The patent application described the reduction in cancer in mouse studies, prompting stories in the media that Liggett was the first cigarette company to admit that smoking caused cancer. Liggett responded by issuing a press release it called a "Liggettgram" which stated:

"Liggett and the cigarette industry continue to deny, as they have consistently, that any conclusions can be drawn relating such test results on mice in laboratories to cancer in human beings. It has never been established that smoking is a cause of human cancer.

"The laboratory experiments reported in the patent were conducted for Liggett by an independent researcher, The Life Sciences Division of Arthur D. Little, Inc."

107. Dr. Mold has estimated that, at the time Liggett made this statement, Liggett had spent a total of $10 million on research involving mice, in part to develop the XA cigarette. Liggett's internal reports on the benefit of the XA, and the absence of increased risk of harm from the additives used, specifically used animal studies as reliable indicators of the health effect of the product on humans.

108. Brown & Williamson also attempted to develop a so-called "safer cigarette." By the end of the 1970's, however, Brown & Williamson, in a pattern that was repeated throughout the industry, halted all work on a "safer cigarette."

109. RJR also undertook efforts to develop a so-called "safer cigarette," focusing on delivering nicotine to the consumer without the harmful constituents of tobacco smoke. In the late 1980's, RJR developed and test marketed Premier, a smokeless and virtually tobacco-free cigarette, which was, in essence, a nicotine delivery system. RJR ultimately abandoned development of Premier or other "safer" cigarette products.

K. ENVIRONMENTAL TOBACCO SMOKE

110. The tobacco companies have also attempted to mislead the public regarding the health risks of environmental tobacco smoke. Environmental tobacco smoke, also called "second hand smoke" primarily consists of sidestream smoke (SSS) and mainstream smoke (MSS). SSS is the smoke that issues from the end of a burning cigarette, cigar or pipe in between puffs. MSS is the smoke that smokers draw into and expel from their lungs. Approximately 85% of environmental tobacco smoke is SSS.

111. The United States Environmental Protection Agency has listed environmental tobacco smoke as a Class A (known human) carcinogen and a major source of respiratory problems in children. It is estimated that 650-700 nonsmoking Connecticut residents die each year due to the effects of environmental tobacco smoke.

112. The tobacco companies have long known that environmental tobacco smoke is dangerous to human health but, despite their repeated promises to investigate the health risks of their products, have not disclosed this knowledge to the public. For example, internal documents of Brown & Williamson and BAT demonstrate that, as early as the mid-1970's, the industry began the work of identifying "sidestream constituents which may be considered harmful to non smokers." Internal documents show that BAT was actively engaged in measuring the levels of nitrosamine, potent human carcinogens, in second hand smoke:

> "It is clear that in many countries there is a concern over the level of nitrosamine in foodstuffs. This explains in part the sensitivity to the presence of nitrosamine in tobacco smoke, and, perhaps particularly, the levels of nitrosamine in sidestream smoke. The

latter is a potential threat to the currently held view by many authorities that passive smoking does not constitute a direct hazard."

113. In fact, in recognition of the dangers of environmental tobacco smoke, Brown & Williamson and BAT secretly attempted to reduce the amount of sidestream smoke from cigarettes. Notes from a 1980 BAT research conference state: "There was strong support for research into the generation and control of sidestream smoke. . . . The research into the source and mechanism of formation of nitrosamine in both sidestream and mainstream should be considered with urgency." Notes from a 1982 research conference state: "Sidestream has long been known to be different chemically from mainstream, but only recently have there been signs from [BAT's] inhalation studies that the biological activity [carcinogenic effect] of sidestream may also be significantly different from mainstream. An early design of reduced sidestream product developed at [BAT's research facilities in Southampton, England] has recently been screened."

114. In conjunction with the attempt to reduce sidestream smoke because of its admitted dangers, Brown & Williamson and BAT -- in violation of the promise to investigate in an unbiased manner the health effects of smoking -- also conducted defensive scientific research designed "to anticipate and refute claims about the health effects of passive smoking."

115. The attempt to mislead the public about the dangers of environmental tobacco smoke and to conceal and distort the true facts was not limited to Brown & Williamson and BAT. The tobacco industry as a whole, through CTR and the Tobacco Institute, also participated in the deception and wrongful conduct. For example, CTR sponsored a research project on sick building syndrome to be

conducted by an allegedly independent firm. However, the Tobacco Institute, the industry's chief public relations and lobbying arm, chose the homes that would participate in the study. The tobacco companies also heavily relied on another study, funded through an industry sponsored organization, to support its claim that the dangers of environmental tobacco smoke were not proven. That study was later found, following a congressional inquiry, to be rife with falsified data and grossly underestimated the impacts of environmental tobacco smoke on indoor air quality.

116. The tobacco companies have also attacked independent studies that demonstrate the link between environmental tobacco smoke and adverse health effects despite internally recognizing their validity. For example, a 1981 Japanese study found that non-smoking women married to smokers have a greater chance of dying of lung cancer than non-smoking women married to non-smokers. The Tobacco Institute immediately ran large advertisements in newspapers and magazines denouncing the study despite the fact that industry scientists privately recognized its validity.

L. SUCCESS AND RENEWAL

117. Since its inception in the mid 1950's, the plan of the tobacco companies to engage in a pattern of misrepresentation, disinformation and suppression regarding the adverse health effects caused by tobacco products has been carried out for four main purposes: (1) to prevent, limit or forestall the erosion of demand for tobacco products; (2) to shield tobacco companies from having to pay the health care costs for tobacco-related diseases; (3) to restrain competition within the tobacco products industry and (4) to prevent, limit and forestall governmental regulation of tobacco products. Reflecting back on this plan, a 1972 internal Tobacco Institute memorandum stated:

> "For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts -- litigation, politics and public opinion....
>
> On the litigation front for which the strategy was designed, it has been successful... [W]e have not lost a liability case."

118. That 1972 Tobacco Institute memorandum recognized the need to continue and intensify the work of the past twenty years:

> "In the cigarette controversy, the public -- especially those who are present and potential supporters (e.g., tobacco state congressman and heavy smokers) -- must perceive, understand and believe in evidence to sustain their opinions that smoking may not be a causal factor.
>
> As things stand, we supply them with too little in the way of ready-made credible alternatives."

The memorandum goes on to propose the "steps required to start a shift in public opinion" in part by designing a study whose results would be disclosed only "if favorable."

119. Despite overwhelming scientific evidence, and the confirmation of this evidence by their own internal research, the tobacco companies and the other defendants continue to this day to repeat over and over, in a unified stance, that there is no causal connection between the use of tobacco products and human diseases. These representations are misleading, deceptive and untrue. They rest at the heart of the industry's ongoing conspiracy to market and profit from a product it knows is deadly.

IV. THE ROLE OF NICOTINE IN TOBACCO PRODUCTS

120. The tobacco companies also have made every effort to conceal and deny that the nicotine in tobacco products is a powerfully addictive substance. Because nicotine is addictive, consumers who use tobacco products often find themselves "hooked" and are unable to stop using the products even if they want to. Of the seventeen million smokers who try to quit each year, fewer than one out of ten succeeds. The tobacco companies have carefully studied nicotine's addictive character and acted upon that knowledge to maintain tobacco products sales. Yet, each of the tobacco companies has denied that nicotine is addictive.

121. This public deception and the industry's secret manipulation of nicotine were and are critically important to the tobacco companies. As objective researchers increased their warnings about the health dangers of tobacco products, nicotine addiction kept people using those products despite those warnings. This aspect of their deception allowed and continues to allow the tobacco companies to continue to sell their dangerous products -- even to those who eventually come to doubt the industry's health claims. And if a new consumer is fooled for a time by "pro-tobacco" disinformation on health or seduced by the industry's aggressive marketing techniques, and uses tobacco products, it may well be too late. Instead of a simple decision not to purchase a product, the consumer then must fight an addiction to nicotine.

A. INDUSTRY RESEARCH OF NICOTINE AND KNOWLEDGE OF ITS ADDICTIVENESS

122. Tobacco companies have known since at least the early 1960s of the addictive properties of the nicotine contained in the tobacco products they manufacture and

sell. Industry documents are replete with evidence of such knowledge:

a. In 1962, Sir Charles Ellis, scientific advisor to the board of directors of BAT, stated at a meeting of BAT's worldwide subsidiaries, that "smoking is a habit of addiction" and that "[n]icotine is not only a very fine drug, but the technique of administration by smoking has considerable psychological advantages . . . ." He subsequently described Brown & Williamson as being "in the nicotine rather than the tobacco industry."

b. A research report from 1963 commissioned by Brown & Williamson describes the results if a chronic tobacco products user is denied nicotine: "A body left in this unbalanced state craves for renewed drug intake in order to restore the physiological equilibrium. This unconscious desire explains the addiction of the individual to nicotine."

c. Addison Yeaman, general counsel at Brown & Williamson, summarized his view about nicotine in an internal memorandum also in 1963: "Moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms."

d. Internal reports prepared by Philip Morris in 1972 and the Philip Morris U.S.A. Research Center in March 1978, demonstrate Philip Morris' understanding of the role of nicotine in tobacco use: "We think that most smokers can be considered nicotine seekers, for the pharmacological effect of nicotine is one of the rewards that come from smoking. When the smoker quits, he foregoes [sic] his accustomed nicotine. The change is very noticeable, he misses the reward, and so he returns to smoking."

e. From 1940 to 1970, ATC conducted its own nicotine research, funding, in whole or in part, over 90 studies on the pharmacological and other effects of nicotine on

the body. This research constituted 80% of all biological studies funded by ATC over this period. From its earliest work, ATC understood that nicotine had addictive qualities. In a 1945 study summarized in an ATC report on its research, 24 smokers were given cigarettes with extremely low levels of nicotine. The study showed that 12 of the subjects "definitely missed the nicotine" and 9 of the subjects continued to do so throughout the one month period of the study. The study concluded that "with some individuals, nicotine becomes a major factor in the cigarette habit."

f. In a 1972 document entitled "RJR confidential research planning memorandum on the nature of the tobacco business and the crucial role of nicotine therein," an RJR executive wrote: "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized, and stylized segment of the pharmaceutical industry. Tobacco products uniquely contain and deliver nicotine, a potent drug with a variety of physiological effects."

g. In a 1972 memorandum on product development, US Tobacco noted that a particular focus should be on assuring adequate "nicotine satisfaction." In a 1981 memorandum, Per Erik Lindqvist, US Tobacco Senior Vice President of Marketing set out the criteria for a new smokeless tobacco product: "Flavorwise we should try for innovation, taste and strength. Nicotine should be medium, recognizing the fact that virtually all tobacco usage is based upon nicotine, 'the kick,' satisfaction." Asked to later explain this statement, Lindqvist admitted: "All tobacco products contain nicotine. Nicotine gives the consumer satisfaction. Some would describe it as a pleasant feeling. Others would describe it as a kick . . . . Others would describe it as a relaxing feeling."

123. The tobacco companies understood early on that nicotine was the key to their industry's success. The tobacco companies have conducted extensive research establishing that users of tobacco products require a certain level of nicotine and that tobacco "satisfaction" is attributable to nicotine's effect on the body after absorption.

124. Documents from a BAT study called Project Hippo demonstrate that as far back as 1961, BAT was actively studying the physiological and pharmacological effects of nicotine in order to understand "why cigarette smokers are so fond of their habit." Project Hippo reports were circulated to other U.S. tobacco products manufacturers and to TIRC, demonstrating that at least some of the industry's nicotine research was shared. BAT sent the reports to officials at Brown & Williamson and RJR, and circulated a copy to TIRC with a request that TIRC "consider whether it would help the U.S. industry for these reports to be passed on to the Surgeon General's Committee."

125. A 1983 industry report also concluded that the primary reason people use tobacco products "is probably the physiological satisfaction provided by the nicotine level of the product."

126. The industry's recognition of the extent to which nicotine defines its product is illustrated in a 1972 Philip Morris report on a CTR conference, which stated:

> "As with eating and copulating so it is with smoking. The physiological effect serves as the primary incentive, all other incentives are secondary. The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the

argument goes, there would be no smoking. . . .

> "Why then is there not a market for nicotine per se, eaten, sucked, drunk, injected, inserted, or inhaled as a pure aerosol? The answer, and I feel quite strongly about this, is that the cigarette is in fact among the most awe-inspiring examples of the ingenuity of man. Let me explain my conviction. The cigarette should be conceived not as a product but as a package. The product is nicotine. . . .
>
> "Think of the cigarette pack as a storage container for a day's supply of nicotine. . . . Think of the cigarette as a dispenser for the dose unit of nicotine."

127. As recently as December 1995, the Wall Street Journal reported on an internal Philip Morris draft document analyzing the competitive market for tobacco products for the years 1990 - 1992. The report describes the importance of nicotine:

> "Different people smoke for different reasons. But the primary reason is to deliver nicotine into their bodies. . . . . It is a physiologically active, nitrogen containing substance. Similar organic chemicals include nicotine, quinine, cocaine, atropine and morphine. While each of these substances can be used to affect human physiology, nicotine has a particularly broad range of influence. During the smoking act, nicotine is inhaled into the lungs in smoke, enters the

bloodstream and travels to the brain in about eight to ten seconds."

128. The tobacco companies have long understood that reducing or eliminating nicotine from their products would hurt sales and profits. As one company researcher wrote in a 1978 report to Philip Morris executives:

> "If the industry's introduction of acceptable low-nicotine products does make it easier for dedicated smokers to quit, then the wisdom of the introduction is open to debate."

129. Instead of reducing or eliminating nicotine from their products, the industry attempted to develop ways of delivering adequate doses of nicotine to create and sustain addiction in the user. Nicotine, in itself, however, causes dangerous cardiovascular effects. In particular, it causes a narrowing of the blood vessels, increased heart rate, increased blood pressure, changes in lipid metabolism and, in some cases, irregular heart rhythms, all of which can accelerate the accumulation of fatty deposits in the arteries and contribute to myocardial infarctions.

130. Some tobacco companies studied artificial nicotine or nicotine analogues that would have the addictive and psycho-pharmacological properties of nicotine without its dangerous effects on the heart. Dr. Victor DeNoble was hired by Philip Morris, in part, to research and develop a nicotine analogue.

131. DeNoble discovered such an analogue, but Philip Morris chose to halt its effort to determine whether the nicotine analogue could be used to make a so-called "safer cigarette." Philip Morris decided not to pursue nicotine analogues in order to avoid the risk of adverse publicity and of compromising the industry's consistent position that there was no alternative design for cigarettes.

132. Brown & Williamson also understood that nicotine was the essential ingredient in maintaining tobacco sales. During its efforts to develop the so-called "safer cigarette," internal documents describe such a product as "a nicotine delivery device."

133. RJR's efforts to develop its "safer cigarette" also focused on delivering nicotine to the consumer without the harmful constituents of tobacco smoke.

134. To this day, the tobacco companies have concealed from the public, public health officials, and Congress their extensive knowledge of the addictive properties of nicotine and its critical role in tobacco products use.

135. In addition to concealing their knowledge, the tobacco companies have affirmatively misrepresented the role of nicotine in tobacco use. Even today, defendants continue to claim that nicotine is important in cigarettes for taste and "mouth-feel." However, tobacco industry patents specifically distinguish nicotine from flavorants and an RJR book on flavoring tobacco, while listing approximately a thousand flavorants, fails to include nicotine as a flavoring agent. The tobacco companies have actually concentrated on developing technologies to mask the acrid flavor of increased levels of nicotine in cigarettes.

B. SUPPRESSION AND CONCEALMENT OF RESEARCH ON NICOTINE ADDICTION

136. The tobacco companies, rather than fulfilling their promise to the public to disclose material information about the use of tobacco products and health, chose a course of suppression, concealment and disinformation about the true properties of nicotine and the addictiveness of using tobacco products.

137. Philip Morris hired Victor DeNoble in 1980 to study nicotine's effects on the behavior of rats and to research and test potential nicotine analogues. DeNoble carried out his research with Paul C. Mele, a behavioral pharmacologist.

138. DeNoble and Mele discovered that nicotine met two of the hallmarks of potential addiction -- self-administration (rats would press levers to inject themselves with a nicotine solution) and tolerance (a given dose of nicotine over time had a reduced effect).

139. Philip Morris instructed DeNoble and Mele to keep their work secret, even from fellow Philip Morris scientists. Test animals were delivered at dawn and brought from the loading dock to the laboratory under cover. Memos, notebooks, external communications and internal reports were increasingly scrutinized, revised and censored by Philip Morris management to make sure that no sensitive terms such as "addictive" were being incorporated into any of the company's written documentation.

140. DeNoble was later told by the company that the data he and Mele were generating could be damaging. Philip Morris executives began talking of killing the research or moving it outside of the company so Philip Morris would have more freedom to disavow the results.

141. In August 1983, Philip Morris ordered DeNoble to withdraw from publication a research paper on nicotine that had already been accepted for publication after peer review by the journal Psychopharmacology. According to DeNoble, the company changed its mind because it did not want its own research to compromise the company's defense asserted in litigation recently filed against it. Philip Morris officials had interpreted the suppressed nicotine

studies as showing that, in terms of addictiveness, "nicotine looked like heroin."

142. In April 1984, Philip Morris closed DeNoble's nicotine research lab. DeNoble and Mele were forced abruptly to halt their studies, turn off all their instruments and turn in their security badges by morning. Philip Morris subsequently threatened them with legal action if they published or talked about their nicotine research. According to DeNoble, the lab literally vanished overnight. The animals were killed, the equipment was removed and all traces of the former lab were eliminated.

143. DeNoble testified to the Waxman Subcommittee that "senior research management in Richmond, Va., as well as top officials at the Philip Morris Company in New York, continually reviewed our research and approved our research." DeNoble also stated that these officials, including the president of Philip Morris, were specifically told that nicotine had addictive qualities.

144. Other tobacco companies were also actively suppressing and concealing their research on nicotine addiction. For example, Brown & Williamson undertook its potentially sensitive research on nicotine through a contractor in Geneva, Switzerland, and through British affiliates at an English lab called Harrogate.

145. In 1963, Brown & Williamson debated internally whether to disclose to the U.S. Surgeon General, who was preparing his first official report on smoking and health, what the company knew about the addictiveness of nicotine and the adverse effects of the use of tobacco products on health. Addison Yeaman, the company's general counsel, advised Brown & Williamson to "accept its responsibility" and disclose its findings to the Surgeon General. He said

that such disclosure would then allow the company openly to research and develop a "safer cigarette."

146. Brown & Williamson rejected Yeaman's advice to make full disclosure to the Surgeon General. A series of six letters and telexes exchanged by Yeaman and senior BAT official A.D. McCormick between June 28 and August 8, 1963 document the company's decision not to disclose its research findings to the Surgeon General. Some of that research was later characterized in a report in the Journal of the American Medical Association as "at the cutting edge of nicotine pharmacology." Tobacco industry internal research on the effects of nicotine preceded the main published reports from the general scientific community by several years.

C. INDUSTRY CONTROL AND MANIPULATION OF NICOTINE

147. Tobacco companies have developed and used highly sophisticated technologies designed to deliver nicotine in precisely calculated quantities -- quantities that are more than sufficient to create and sustain addiction in the vast majority of individuals who use tobacco products regularly. Tobacco companies control the nicotine content of their products through selective breeding and cultivation of plants for nicotine content, and careful tobacco leaf purchasing plans. The companies control nicotine delivery (i.e., the amount made available to the tobacco products user) with various design and manufacturing techniques.

1. Manipulation of Nicotine Content: Y-1

148. Brown & Williamson's development of a new tobacco plant dubbed "Y-1" is an egregious example of the cigarette industry's concealment of its control and manipulation of the nicotine levels in its products.

149. In a decade-long project, Brown & Williamson secretly developed a genetically-engineered tobacco plant, which the company called "Y-1," with a nicotine content more than twice the average found naturally in flue-cured tobacco. Brown & Williamson took out a Brazilian patent for the new plant, which was printed in Portuguese. Brown & Williamson and a Brazilian sister company, Souza Cruz Overseas, grew Y-1 in Brazil and shipped it to the United States where it was used in five Brown & Williamson cigarette brands sold in Connecticut, including three labeled "light."

150. When four investigators from the Food and Drug Administration ("FDA") visited the Brown & Williamson plant in Macon, Georgia on May 3, 1994, Brown & Williamson officials denied that the company was involved in "any breeding of tobacco for high or low nicotine levels." As part of its attempt to cover-up its project, Brown & Williamson instructed the DNA Plant Technology Corporation of Oakland, California, which had developed Y-1, to tell FDA investigators that Y-1 had "never [been] commercialized."

151. Only after the FDA discovered two United States Customs Service invoices indicating that "more than a half-million pounds" of Y-1 tobacco had been shipped to Brown & Williamson on September 21, 1992, did the company admit that it had developed the high-nicotine tobacco and that close to four million pounds of Y-1 were stored in company warehouses in the United States.

152. Philip Morris also undertook development of methods to boost or manipulate the nicotine content of tobaccos. According to Ian Uydess, a Philip Morris scientist:

> "In the 1980's, Philip Morris conducted field experiments on the growth of tobacco with

elevated nicotine levels for possible use in their products. Philip Morris examined a technique called 'ratooning' which involved cutting down of the tobacco plant early in the harvest cycle before the plant had fully matured. As the cut plant resumed its growth, the roots deposited elevated levels of nicotine in the leaves of the plant. . . . This technique produced tobacco leaves that had higher nicotine levels than the leaves of non-ratooned plants."

153. Y-1 and the experiments conducted by Philip Morris are examples of an overall trend in the tobacco industry to increase the nicotine content of tobaccos. American tobaccos of all types have undergone cumulative increases in total nicotine levels since the 1950s. Nicotine levels in the most widely grown American tobaccos increased between 10 - 50 percent between 1955 and 1980. This increase is the result of the industry's active and controlling participation in efforts to breed and cultivate tobacco for high nicotine levels.

2. Manipulation of Nicotine Delivery

154. The nicotine content of unprocessed tobacco is not the only variable manipulated by the tobacco companies to deliver a pharmacologically active dose of nicotine to the tobacco products user. Modern tobacco products as sold in Connecticut are painstakingly designed and manufactured to control nicotine delivery to the consumer.

155. David A. Kessler, M.D., Commissioner of the Food and Drug Administration, testified in detail before the Waxman Committee about the various forms of nicotine manipulation practiced by the tobacco industry: manipulating the rate at which nicotine is delivered in the cigarette;

transferring nicotine from one material to another; increasing the amount of nicotine in cigarettes; and adding nicotine to any part of a cigarette.

156. Dr. Kessler's testimony shows that nicotine is not an inevitable or unavoidable component of tobacco products, and that the tobacco companies have the capability to remove all or virtually all of the nicotine from tobacco products using technology already in existence. They also have the capability to add nicotine to tobacco products.

157. One tobacco company, ATC, has admitted test- marketing a nicotine-enriched cigarette in 1969.

158. Tobacco industry patents show that the tobacco companies have developed the capability to manipulate nicotine levels in cigarettes to an exacting degree. For example:

> a. A Philip Morris patent application discusses an invention that "permits the release . . . in controlled amounts and when desired, of nicotine into tobacco smoke."
>
> b. Another Philip Morris patent application explains that the proposed invention "is particularly useful for the maintenance of the proper amount of nicotine in tobacco smoke," and notes that "previous efforts have been made to add nicotine to Tobacco Products when the nicotine level in the tobacco was undesirably low."
>
> c. A 1991 RJR patent application states that "processed tobaccos can be manufactured under conditions suitable to provide products having various nicotine levels."

159. One method that the tobacco companies use to manipulate nicotine levels in their products involves the

addition of several ammonia compounds during the manufacturing process which increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes.

160. Brown & Williamson has recently publicly denied that the use of ammonia in the processing of tobacco increases the amount of nicotine delivered to the smoker. Nevertheless, the company's own internal documents reveal that it and virtually all other tobacco companies use ammonia compounds to increase nicotine delivery. A 1991 Brown & Williamson confidential blending manual states:

> "Ammonia, when added to a tobacco blend, reacts with the indigenous nicotine salts and liberates free nicotine . . . . As the result of such change the ratio of extractable nicotine to bound nicotine in the smoke may be altered in favor of extractable nicotine. As we know, extractable nicotine contributes to impact in cigarette smoke and this is how ammonia can act as an impact booster."

According to the Brown & Williamson manual, all American tobacco companies except Liggett use ammonia technology in their cigarettes.

161. At Philip Morris, ammonia is regularly added to the slurry of tobacco by-products from which reconstituted tobacco is made.

162. According to Dr. Wigand, a former Brown & Williamson scientist, "[t]he primary form of managing or manipulating nicotine delivery . . . is by use of ammonia compounds."

163. The tobacco companies' manipulation and control of nicotine levels is further evidenced by the emergence of companies that specialize in manipulating nicotine and that are now offering their services to tobacco

manufacturers. A process called tobacco reconstitution, patented and marketed by a Kimberly-Clark Corporation subsidiary, LTR Industries, is widely used throughout the industry.

164. Reconstituted tobacco is made from stalks and stems and other waste that tobacco companies formerly discarded and now used to make cigarettes more cheaply. In the reconstitution process, pieces of tobacco material undergo treatment that results in the extraction of some soluble components, including nicotine. The pieces are then physically formed into a sheet of tobacco material, to which the extracted nicotine is re-added. Although denied by tobacco executives, it has been publicly reported that this process adjusts nicotine levels in the products, and that one manufacturer, RJR, "readily admits to setting levels of nicotine . . . for the tobacco sheet."

165. An advertisement in tobacco industry trade publications for the Kimberly-Clark tobacco reconstitution process states:

> "Nicotine levels are becoming a growing concern to the designers of modern cigarettes, particularly those with lower 'tar' deliveries. The Kimberly-Clark tobacco reconstitution process used by LTR Industries permits adjustments of nicotine to your exact requirements . . . . We can help you control your tobacco."

166. The tobacco industry's own trade literature explains that the Kimberly-Clark process enables manufacturers to triple or even quadruple the nicotine content of reconstituted tobacco, thereby increasing the nicotine content of the final manufactured product.

167. Another enterprise quite explicitly specializes in the manipulation of nicotine and its use as an additive. This company does business under the name "The Tobacco Companies of the Contraf Group." An advertisement run by the Contraf Group in the international trade press states: "Don't Do Everything Yourself! Let us do it More Efficiently!" Calling itself "The Niche Market Specialists," Contraf lists among its areas of specialization "Pure Nicotine and other special additives."

168. Two former Philip Morris scientists, Ian Uydess and Jerome Rivers, have described in affidavits how Philip Morris manipulates the nicotine content of its tobacco products in order to deliver targeted levels of nicotine to the smoker. According to Dr. Uydess:

> "Nicotine levels were routinely targeted and adjusted by Philip Morris in its various products at least in part through blend changes and blend design. . . .
>
> Tobacco companies like Philip Morris learned a long time ago that it was hard to get people to stay with a good tasting product if the nicotine level was too low. . . . Theinformation gained by Philip Morris from the chemical analysis of tobacco of different varieties, ripeness, etc., was used in the blend design of new products to ensure that the desired amount of "high" or "low" nicotine tobaccos were present in order to deliver the amount of nicotine (or other tobacco constituents) that had been targeted for that product."

If sales of a new product in test markets were disappointing, "it was suggested that the product development

group might have to adjust the blend so as to raise the nicotine level in order to increase its 'staying power' (acceptability and sale) in the market place."

169. According to Dr. Jeffrey Wigand, a former researcher for Brown & Williamson, Brown & Williamson manipulated nicotine levels in its products in a number of ways. In addition to using additives such as ammonia to change the pH of the tobacco smoke in order to convert total nicotine to free nicotine, Brown & Williamson, like Philip Morris, utilized blending techniques "as a way of assuring the appropriate nicotine level." The company also manipulated nicotine levels "through cigarette design, through filtration, through paper design."

3. Manipulation of Nicotine Delivery in Smokeless Tobacco

170. US Tobacco has intentionally manipulated the amount of nicotine in its products since at least the 1970s. This manipulation is achieved through several means. First, the amount of total nicotine contained in the product is manipulated through the selection and blending of particular types of tobacco leafs. Second, US Tobacco manipulates the amount of "free" nicotine in its products. The amount of "free" nicotine determines how much nicotine is actually absorbed into the users' system. Levels of "free" nicotine are controlled by adjusting the pH of the product, either through a fermentation process, by adding alkaline buffering agents such as sodium bicarbonate and ammonium bicarbonate, or by altering moisture content.

171. Several former US Tobacco chemists have admitted that US Tobacco manipulates the amount of free nicotine in its product. For example, one employee stated in 1994 that "US Tobacco routinely adds chemicals to its snuff to deliver the free nicotine faster and to make the product

stronger . . . . [Copenhagen] was brought up to a pH of 7.8 by adding more sodium bicarbonate and ammonium bicarbonate." Another admitted: "The fermentation process involves adding chemicals and, at the end, you add some more chemicals which increase the pH too . . . . Without increasing the pH, you couldn't get nicotine release."

172. US Tobacco has used its manipulation of nicotine content in a carefully designed marketing strategy to attract new users to its smokeless tobacco and then to addict them to the nicotine in its products. This strategy has been described by US Tobacco as a "graduation" strategy because it employs lower nicotine product choices from which the more "experienced" smokeless tobacco user graduates to heavier nicotine brands.

173. If new users, such as children or adolescents, begin smokeless tobacco use with one of US Tobacco's high nicotine brands such as Skoal Fine Cut or Copenhagen, a toxic response to the nicotine such as dizziness or nausea may occur and the novice is more likely to quit before tolerance to the toxic effects of nicotine begins to develop. To respond to this scenario and to attract and keep new customers, US Tobacco has developed low nicotine starter brands such as Happy Days, Skoal Bandits and Skoal Long Cut.

174. In 1985, US Tobacco Vice President Jack Affrick explained in a company newsletter:

> "As far as our strategy for entering a new market is concerned -- for each market there is a set of criteria which have been established, and must be met. Skoal Bandits is the introductory product, and then we look towards establishing a normal graduation process."

175. Marketing consultants for US Tobacco also have described the graduation theory:

> "New users of smokeless tobacco -- attracted to the category for a variety of reasons -- are most likely to begin with products that are more mild tasting, more flavored, and easier to control in the mouth. After a period of time, there is a natural progression of product switching to brands that are more full-bodied, less flavored [and] have more concentrated 'tobacco taste' than the entry brand."

176. US Tobacco has also referred to this strategy within the company. Ken Carlson, a division manger in US Tobacco's sales department from 1979 to 1986, has disclosed: "they talked about graduation all the time -- in sales meetings, memos and manuals for the college program. It was a mantra."

177. A 1986 brochure for US Tobacco's Skoal Bandits describes to new users how to begin the graduation process by developing a tolerance for the toxic effects of nicotine:

> "**How long should I keep the pouch in my mouth?** If you haven't tried Skoal Bandits before, we recommend that you keep your first one in for about a minute--then remove. The next time you try another one, leave it in for a bit longer. Like your first beer, Skoal Bandits can be a taste that takes time to acquire and get the most out of. After four or five Skoal Bandits you'll find you've developed quite a taste for them and you'll want to

keep a pouch in as long as the flavour lasts -- this varies from person to person."

D LIGHT CIGARETTES: A MARKETING HOAX

178. The tobacco companies' manipulation of nicotine is particularly deceptive in its marketing of "light" or low-tar and low-nicotine cigarettes to retain the "health conscious" segment of the smoking market. Recent studies demonstrate that cigarettes advertised as low tar and low nicotine have higher concentrations of nicotine, by weight, than high yield cigarettes. Nevertheless, the tobacco companies have successfully identified "light" cigarettes to consumers as a reduced tar and reduced nicotine product. The tobacco companies have accomplished this deception through several strategies.

179. First, tobacco companies have designed their "light" products so that advertised tar and nicotine levels, as measured by the FTC method, understate the amounts of tar and nicotine actually ingested by human smokers. Such design features include a technique called filter ventilation in which nearly invisible holes are drilled in the filter paper, or the filter paper is made more porous. Predictably, many smokers of advertised low tar and nicotine cigarettes block the tiny, laser-generated perforations in ventilated filters with their fingers or lips, thereby resulting in greater tar and nicotine yields to those smokers than those measured by the FTC smoking machine.

180. Tobacco companies know that the ability to block ventilation holes allows smokers to "compensate" for nicotine losses that would otherwise be caused by tar-reducing modifications. The industry has studied smoker compensation in order to design cigarettes that allow smokers to compensate for lower nicotine yields. One such design feature is known as "elasticity." This refers to the

ability of a cigarette, whatever its FTC measured nicotine yield, to deliver enough smoke to permit a smoker to obtain the nicotine he needs, e.g., through more or longer puffs, or by covering ventilation holes.

181. Industry studies show that smokers tend to obtain close to the same amount of nicotine from each cigarette despite differences in yield as measured by the FTC smoking machine. In a 1974 BAT conference, researchers described the result of one such study:

> "The Kippa study in Germany suggests that whatever the characteristics of cigarettes as determined by smoking machines, the smoker adjusts his pattern to deliver his own nicotine requirements (about 0.8 mg. per cigarette)."

182. Second, the FTC testing method does not distinguish between the slower acting salt-bound nicotine and the more potent "free" nicotine that ammonia helps release. An ammoniated cigarette that delivers more potent nicotine to smokers measures the same as a cigarette with no such additives.

183. The use of ammonia is another method used by the tobacco companies to reduce the FTC measured tar and nicotine levels in their cigarettes over the past two decades while still furnishing smokers with sufficient nicotine delivery. According to John Kreisher, a former associate scientific director for CTR, "[a]mmonia helped the industry lower the tar and allowed smokers to get more bang with less nicotine. It solved a couple of problems at the same time."

184. Third, the tobacco companies maintain that nicotine levels follow tar levels. In the words of Dr. Alexander Spears, Vice Chairman of Lorillard, in his 1994

testimony before the Waxman Subcommittee -- "[n]icotine [level] follows the tar level," and the correlation between the two "is essentially perfect," and "shows that there is no manipulation of nicotine." As Dr. Spears neglected to mention to Congress, however, in a 1981 study not intended for public release he stated explicitly that low-tar cigarettes use special blends of tobacco to keep the level of nicotine up while tar is reduced: "[T]he lowest tar segment [of product categories] is composed of cigarettes utilizing a tobacco blend which is significantly higher in nicotine."

185. RJR, ATC and the Tobacco Institute have similarly represented to the public and to the FDA that the nicotine levels in their products are purely a function of setting the tar levels of such products.

186. ATC told the Waxman Subcommittee in an October 14, 1994 letter that "nicotine follows 'tar' delivery, i.e. high 'tar' -- high nicotine, low 'tar' -- low nicotine . . . . Nicotine is neither adjusted nor altered to compensate for losses inherent in the manufacturing process." Internal company documents reviewed by the Waxman Subcommittee show, however, that ATC's experimentation with adding nicotine to its tobacco was extensive -- extensive enough for ATC executive John T. Ashworth to instruct employees in a confidential memorandum: "In the future, our use of nicotine should be referred to as 'Compound W' in our experimental work, reports, and memorandums, either for distribution within the Department or for outside distribution."

187. Recent tests conducted at the direction of the FDA show that the low-tar brands actually have more nicotine by weight than the non-"light" brands. The defendants' misrepresentation that cigarettes with lower levels of tar also have lower levels of nicotine seriously misleads consumers and renders false the industry's claim of an "essentially perfect" correlation between reduced tar and nicotine

levels. According to the FDA, this has been accomplished by a combination of the methods described above for boosting nicotine delivery to compensate for nicotine losses from the application of tar-reducing design modifications. The tobacco companies thereby maintain a continuing market for a product that consumers are misled to believe contains less of all of the harmful ingredients in regular cigarettes.

188. Notwithstanding the tobacco companies' ongoing manipulation and control of nicotine levels in tobacco products, the tobacco companies continue to deny to the public, and recently denied to Congress under oath, that they manipulate and control nicotine levels.

189. Top executives from Philip Morris, RJR, Lorillard, Liggett, Brown & Williamson and US Tobacco testified in April 1994 that their respective companies do not manipulate nicotine, add it, independently control it, restore it during the manufacturing process, or otherwise achieve a minimum level of nicotine in their products. Thomas E. Sandefur, Jr., then CEO of Brown & Williamson, admitted that the company controlled nicotine, but in a now familiar refrain, stated that the company did so only for "taste."

190. As recently as April 1994, tobacco companies placed advertisements across the country denying that they believe the use of tobacco products is addictive, and misleading the public about whether the tobacco companies deliberately control nicotine levels in their products.

191. An advertisement placed by Philip Morris in newspapers across the country, including the Hartford Courant, in April 1994, affirmatively represented that Philip Morris does not "manipulate" nicotine levels in its cigarettes, and that "Philip Morris does not believe that cigarette smoking is addictive."

192. RJR placed a similar advertisement in newspapers across the United States in 1994 stating that "we do not increase the level of nicotine in any of our products in order to 'addict' smokers. Instead of increasing the nicotine levels in our products, we have in fact worked hard to decrease 'tar' and nicotine . . . ." RJR's advertisement then touted its use of "various techniques that help us reduce the 'tar' (and consequently the nicotine) yields of our products."

193. These statements mislead the consuming public because, as set forth above, Philip Morris and RJR use various sophisticated techniques to increase the nicotine content in their tobacco products and the actual nicotine delivery to the tobacco products user.

194. As a result of defendants' actions, as many as 74% to 90% of tobacco products users are addicted. Eight out of ten smokers say they wish they had never started smoking. 74% of young people regularly using smokeless tobacco find quitting extremely difficult. Over 90% experience withdrawal symptoms when they try. Two-thirds of adults who smoke say they wish they could quit. Seventeen million try to quit each year, but fewer than one out of ten succeeds. A high percentage of the smokers who have surgery for lung cancer or heart attacks return to smoking, as do 40% of smokers who have had their larynxes removed.

V. TARGETING MINORS

A. THE NEED TO ATTRACT AND ADDICT CHILDREN TO TOBACCO PRODUCTS

195. In addition to ensuring a captive market through the addiction of its customers, the tobacco companies maintain their sales and replace hundreds of thousands of tobacco users who die each year by target marketing and promoting their products to minors.

196. Despite the best efforts of parents, educators, the medical profession and public health officials, tobacco use among children and adolescents has been is on the rise. The tobacco companies' pervasive advertising associates tobacco use with healthy, glamorous and athletic lifestyles, with success and with sexual attractiveness. Within a short period of time, the underage tobacco user becomes addicted to tobacco. Later, as the maturing tobacco user begins to wish he or she could quit, advertising reinforces the practice and seeks to minimize health concerns and creates doubt and confusion. The images and message of these advertisements have the purpose and effect of providing tobacco users an excuse to avoid the pain and discomfort of attempting to break their addiction to nicotine. This conduct on behalf of the tobacco companies is particularly egregious in that it is directed at children and adolescents who lack the maturity, judgment and experience of adults. Manipulating levels of nicotine, the addictive ingredient in tobacco products, and then targeting children and adolescents is particularly reprehensible.

197. The overwhelming majority of tobacco products use and addiction begins when users are children or adolescents. Approximately 90 percent of smokers began smoking when they were under the age of eighteen, and the prevalence of tobacco use among adolescents is continually increasing. In 1989 in Connecticut, over one third of all girls and 28.5 percent of boys in grades 9-12 reported that they had smoked in the past month. A survey of high school seniors found that 54 percent of males had used smokeless tobacco products and, of those, over 53 percent had used such products before the eighth grade. Studies demonstrate that the younger one begins to smoke, the more likely it is that that person will become a heavy smoker. Accordingly, the younger a person begins

smoking, the more likely it is that he or she will die of a tobacco-related disease.

198. The tobacco companies are well aware of the importance of reaching the child and adolescent market. For example, in 1984, an RJR marketing report detailed federal research showing that smokers began as early as age 12 and rarely after age 25, with a median age of 17. The tobacco companies have also studied the development of brand loyalty among child and adolescent smokers.

199. Although children and adolescents frequently believe that they will not become addicted to nicotine or become long-term users of tobacco products, they often find themselves unable to quit. Among smokers aging from 12 to 17 years of age, a 1992 Gallup survey found that 70 percent regret their decision to smoke and 66 percent indicate that they want to quit. Fifty one percent of adolescent smokers had made a serious effort to quit, but had failed. Those who are able to quit experience withdrawal symptoms similar to those experienced by adults. The nicotine contained in smokeless tobacco has been shown to have similar effects to that in cigarettes.

200. Tobacco companies understand that advertising campaigns directed at children and adolescents are important tools in increasing their sales. Since 1964, about 44 million Americans have quit smoking and approximately 9 million more have died of tobacco-related diseases. For the tobacco companies to preserve their market status, they must attract two million new users each year to replace these lost consumers. Such new users will overwhelmingly be adolescents who, because of the addictive quality of tobacco products, will be likely to continue their tobacco use through adulthood.

201. While many segments of the adult population have decreased their tobacco use, the prevalence of tobacco use by children and adolescents is on the rise. Between 1991 and 1995, the rate of cigarette consumption among students in grades 9 through 12 increased from 27.5 percent to 34.8 percent. Illegal sales to minors have been estimated to generate well over a billion dollars per year in revenue for the tobacco companies.

202. Tobacco products are among the most heavily advertised in the United States. In 1990, cigarette advertising expenditures were second only to automobile advertising. Between 1970 and 1993, cigarette expenditures for marketing increased from $361 million to over $6 billion, a 1,562 percent increase. In 1993, marketing expenditures for the significantly smaller smokeless tobacco products market exceeded $119 million. As a result, tobacco product brand names, logos and advertising messages appear on billboards, trains, in magazines with high-youth readership and newspapers, on clothing and other goods. Such pervasive images and messages convey to children and adolescents that tobacco use is desirable, socially acceptable, safe, healthy and prevalent in society.

B. THE USE OF MARKETING TO INDUCE MINORS

203. The increase in underage tobacco products use is perpetuated by advertising campaigns that have particular appeal to children and adolescents. Such campaigns promote the product for its symbolic attributes to convey the impression that consumption of the product will enhance the user's self image or image in the community. By way of example, the "Marlboro Man," a Philip Morris campaign, presents an image of adventure and freedom while RJR's "Joe Camel" gives humorous dating tips and engages in activities such as motorcycle riding and waterskiing. Newport

advertisements show young men and women having fun, usually in sexually suggestive positions, under the slogan "Alive with Pleasure" or "Newport Pleasure." Such advertising techniques appeal to children and adolescents by providing them with images to wear as badges of identity. Notsurprisingly, Marlboro, Camel and Newport are the leading cigarette brands used by children and adolescents, among them accounting for 85 percent of the underage market in 1993. These three brands accounted for only 35 percent of the total market share in the same year.

204. Marlboro, which has traditionally dominated the children and adolescent cigarette market, was originally a red tipped cigarette targeted toward the female market with the slogan, "Mild as May." In the 1950s, an advertising campaign which culminated in the creation of the Marlboro cowboy, transformed Marlboro into a "masculine product" intended to appeal to the starter market. Because young smokers often take up the habit as an assertion of independence and adulthood, the Marlboro cowboy campaign emphasizes themes of independence. The Marlboro man is always alone, free from the constraints of an authority figure. There are no parents, no older brothers and no bullies in Marlboro country.

205. While Philip Morris' Marlboro brand has been positioned to appeal to young male smokers, Philip Morris and other defendant tobacco companies have also specifically targeted young females, with brands such as Virginia Slims, Eve and Silva Thins.

206. Thus, Philip Morris has had particular success in appealing to adolescent girls with its "You've Come a Long Way Baby" campaign, promoting Virginia Slims cigarettes. One of the most important psychological needs of most adolescent girls, is to become independent from their parents. Another important psychological need of

adolescent girls is to be perceived as slim. By associating smoking with women's liberation, Philip Morris intended to create in the minds of teenage girls the vision of smoking as a symbol of autonomy and independence. By associating their cigarettes with images of thin and glamorous models, Philip Morris conveys the image that smoking will help girls to lose weight and look slimmer. Indeed, the very name, Virginia Slims, is suggestive. Ads for Virginia Slims and other "feminine" cigarettes prey upon the natural and common insecurity and sense of inferiority experienced by adolescents, by portraying the cigarette as a crutch and a symbol of superiority.

207. As a result of these efforts to target young females, there was, between 1967 and 1975, a substantial rise in the numbers of new female smokers between the ages of 11 and 17.

208. RJR's subsequent use of the "Joe Camel" campaign is a striking example of the power that marketing can have on capturing children and adolescent smokers. The "Joe Camel" campaign was initiated in 1987 to commemorate the 75th anniversary of Camel cigarettes. It soon became evident that the "Joe Camel" cartoon character strikes a responsive chord among children and adolescents. Since then, the campaign has been used to target children to induce them to start smoking as early as possible, so they can become addicted to nicotine and form brand loyalties which will last the rest of their lives.

209. When RJR began the "Joe Camel" cartoon campaign, Camel's share of the children's and adolescent's market was estimated to be between 0.5 percent and 3 percent. In just a few years, Camel's share of the children's and adolescents' market increased to over 13 percent and by some accounts, had increased to over 32 percent.

210. Tobacco products advertising is becoming increasingly concentrated in youth-oriented publications. Moreover, tobacco products ads in these youth-oriented magazines are frequently multi-page, pop-up ads which are significantly more costly, but also more attention-grabbing than conventional ads. By way of example, Rolling Stone magazine recently ran a "rockin ticketmaster" ad in which the opening page featured the Joe Camel character in a leather jacket and t-shirt looking down at the reader saying "Wanna See a Show?" When the reader turns the page, the Joe Camel character pops out of the magazine to hand the reader two tickets with the caption, "Go ahead, its on me."

211. Another strategy that tobacco companies use to appeal to children and adolescents is distributing promotional items, such as T-Shirts, baseball caps and pocket knives through the mail and at promotional events. These items encourage adolescents, to whom such items have great appeal, to accumulate merchandise by buying more cigarettes. More importantly, the items, which do not generally display warning labels, turn the children into walking advertisements that penetrate into schools and other areas where advertising would otherwise be restricted. A 1992 Gallup poll found that about half of adolescent smokers and one quarter of non-smoking adolescents had received at least one of these items.

212. Tobacco companies have also marketed to youth by inserting advertisements for their products into movies that have appeal to children. Such movies include, for example, Superman II, Supergirl and James Bond. A 1983 letter signed by the actor Sylvester Stallone documents one such agreement. Mr. Stallone writes, "I guarantee that I will use Brown & Williamson tobacco products in no less than five feature films. It is my understanding that Brown & Williamson will pay a fee of $500,000.00." Such

"stealth" advertisements are particularly disturbing in that the child and adolescent is particularly susceptible to such role models and is wholly unaware that he or she is the subject of the marketing.

213. Sponsorship of, and placement of billboards at, sporting and entertainment events is another effective means of stealth advertising. Such advertising makes its way onto television, where cigarette advertising is otherwise prohibited. By way of example, when the 1989 Marlboro Grand Prix was televised, the Marlboro logo could be seen for 46 of the 94 total minutes of the event's broadcast time.

214. Despite the overwhelming evidence, the tobacco companies continue to deny any youth-directed advertising and promotional activities. The tobacco companies represent that the purpose and effect of their advertising is limited to maintaining brand loyalty and enticing existing adult smokers to switch brands and that it has no role in encouraging children and adolescents to experiment with tobacco products.

C. The Success of the Strategy

215. The tobacco companies have pursued, and continue to pursue, such advertising campaigns knowing them to be particularly effective for inducing children and adolescents to purchase, use and become addicted to tobacco products. One study found that 30 percent of three year olds and 91 percent of six year olds associated the "Joe Camel" cartoon character with cigarettes. By the age of six, the face of "Joe Camel" and the silhouette of Mickey Mouse were equally well recognized. Studies also show that while adolescents' cigarette consumption tends to be closely correlated to the level of advertising, adults tend to purchase

generic or "value category" cigarette brands, which use little or no "image" advertising.

216. Studies have also demonstrated the success of the tobacco companies' efforts to target young girls under the age of 18. Starting in 1987, with the commencement of new campaigns targeting young girls, there was a sharp rise in new users in the 12 - 17 year old group. The jump was 110 percent in 12 year olds; 55 percent among 13 years olds; 70 percent among 14 year olds; 75 percent among 15 year old; 55 percent among 16 year old; and 35 percent among 17 year olds. During the period 1967 to 1975, there were billions of dollars of sales of Virginia Slims, Silva, and Eve.

217. The tobacco companies' own research confirms the appeal of its marketing campaigns to children. A study funded by RJR found that among three to six year olds, "Joe Camel" was more readily associated with cigarettes than Ronald McDonald was with hamburgers. A 1969 research paper presented to the Philip Morris Board of Directors concluded that "The 16 to 20-year old begins smoking for psychosocial reasons. The act of smoking is symbolic; it signifies adulthood, he smokes to enhance his image in the eyes of his peers."

218. Other tobacco companies research and marketing memoranda that recently have been made public provide compelling evidence that advertising campaigns were designed with the purpose and effect of targeting children and adolescents. A 1976 Secret Memorandum entitled "Planning Assumptions and Forecast for the Period 1976-1986 for R.J. Reynolds Tobacco Company," unabashedly states,

> "Evidence is now available to show that the 14 to 18 year old group is an increasing

segment of the smoking population. RJR must soon establish a successful new brand in this market if our position in the Industry is to be maintained over the long term."

219. A 1973 confidential document from RJR entitled "Research Planning Memorandum on Some Thoughts about New Brands of Cigarettes for the Youth Market" bluntly describes the strategy. The memo states:

> "[I]f our Company is to survive and prosper, over the long term, we must get our share of the youth market . . .
>
> "The expected or derived psychological effects are largely responsible for influencing the pre-smoker to try smoking, and provide sufficient motivation during the 'learning' period to keep the 'learner' going, despite the physical unpleasantness and awkwardness of the period.
>
> "In contrast, once the "learning" period is over, the physical effects become of overriding importance and desirability to the confirmed smoker . . . .
>
> "Once this mechanism [the cigarette] has been experienced and used, physical and psychological habit patterns are firmly established and become self-perpetuating...
>
> "Nicotine Effects - Nicotine should be delivered at about 1.0 to 1.3 mg./cigarette, the minimum for confirmed smokers. The rate

of absorption of nicotine should be kept low by holding pH down, probably below 6.

"II PSYCHOLOGICAL EFFECTS

"[T]here is strong psychological pressure, particularly as a young person, to identify with the group, follow the crowd, and avoid being out of phase with the group's value system . . .

"Thus a new brand aimed at the young smoker . . . should emphasize togetherness, belonging and group acceptance, while at the same time emphasizing individuality and 'doing one's own thing'. . . .

"Self-Image Enhancement - The fragile, developing self-image of the young person needs all of the support and enhancement it can get. Smoking may appear to enhance that self-image in a variety of ways. If one values, for example, an adventurous, sophisticated, adult image, smoking may enhance ones self-image. . . .

"Experimentation - There is a strong drive in most people, particularly the young, to try new things and experiences. This drive no doubt leads many pre-smokers to experiment with smoking, simply because it is there and they want to know more about it."

220. A similar document from a sister company of Brown & Williamson provides: "If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of

younger smokers." The document explained, "[t]he smoker base is declining, primarily as a function of successful quitting. And the characteristics of new smokers are changing such that the future starting level may be in question."

221. RJR MacDonald, an RJR affiliate, conducted a "Youth Target" survey, which was the first of a planned series to study the lifestyles and value systems of young men and women in the 15-24 age range. The stated purpose of the study was to "provide marketers and policy makers with an enriched understanding of the mores and motives of this important emerging adult segment which can be applied to better decision making in regard to products and programs directed at youth." The study focused on the "primary elements of lifestyle and values among the youth of today."

222. The tobacco companies' willingness to follow up on such plans is demonstrated by the Congressional testimony of the model who portrayed the "Winston Man" for RJR's Winston brand cigarettes. He stated: "I was clearly told that young people were the market that we were going after." He further testified, "it was made clear to us that this image was important because kids like to role play, and we were to provide the attractive role models for them to follow . . . . I was told I was a live version of the GI Joe . . . ."

223. Tobacco companies are also aware that once children and adolescents begin smoking, it will be difficult for them to stop. The RJR internal document entitled "Confidential Research and Planning Memorandum on Some Thoughts About New Brands of Cigarettes for the Youth Market" explicitly noted that once the "learning period" for new smokers is over, "physical and psychological" habit patterns become firmly established and self-perpetuating. Studies prepared for an affiliate of Brown & Williamson state that "[h]owever intriguing smoking was at 11, 12 or 13, by the age of 16 or 17 many regretted their use of

cigarettes for health reasons and because they feel unable to stop smoking when they want to." Another document prepared for the same company states, "the desire to quit seems to come earlier now than before, even prior to the end of high school. In fact, it often seems to take hold as soon as the recent starter admits to himself that he is hooked on smoking. However, the desire to quit, and actually carrying it out, are two quite different things, as the would be quitter soon learns."

224. The financial allure of the underage market has not escaped the attention of the smokeless tobacco industry. US Tobacco has successfully revived a declining market for its smokeless tobacco products by targeting children and adolescents. In 1970, moist snuff smokeless tobacco was consumed primarily by men over 50, and young males were among the smallest market share. By 1985, use of moist snuff by young males was double that of men over 50.

225. US Tobacco's campaign to market to children and adolescents was made clear at a 1968 U.S. Tobacco meeting focusing on future markets. According to the minutes, Louis Bantle, then US Tobacco's Vice President for Marketing, set forth the following marketing strategy: "We must sell the use of tobacco in the mouth and appeal to young people. . . . [W]e hope to start a fad."

226. US Tobacco's youth marketing campaign includes a "graduation process" of starting new users on a low nicotine product, and having them graduate to higher nicotine delivery brands as they progress. Advertising dollars and promotions are disproportionately directed toward the low nicotine, "starter brands." Such advertisements have been often delivered by professional athletes and use slogans stressing that the product is easy to use in "places where you can't light up." This message conveys the not so subtle

suggestion that the product can be used without fear of adult detection.

227. Desiring that the users will soon become addicted and graduate to higher nicotine brands, US Tobacco has pursued a strategy of distributing its "starter" products as widely as possible. By way of example, US Tobacco representatives are instructed to distribute free samples of the low nicotine starter brands rather than the high nicotine brands. In 1978 US Tobacco ran advertisements in Sports Illustrated offering free samples of fruit-flavored low-nicotine snuff for beginners. The samples came complete with instructions for use.

228. Like advertising for cigarettes, smokeless tobacco advertising is disproportionately concentrated on the products with the widest appeal to children. In 1983, Skoal Bandits, US Tobacco's low nicotine starter brand, accounted for 47 percent of US Tobacco's advertising dollars, but only 2 percent of the market share by weight. US Tobacco's highest nicotine-delivery brand had only 1 percent of the advertising expenditures, but 50 percent of the market share.

229. Demonstrating the success of the youth marketing program, Bantle, who had helped to initiate the campaign, stated in 1977 that, "In Texas today, a kid wouldn't dare to go to school, even if he doesn't use the product, without a can in his Levi's."

230. The ease with which children and adolescents can purchase tobacco products from stores and vending machines ensures that the tobacco companies will be able to reap the profits from the increased demand created by their advertising targeted at children and adolescents. A recent survey found that over 77 percent of smokers under the age of 18 reported never having been asked for proof of age

when purchasing cigarettes in a store in the 30 days preceding the survey. Seventy-five percent of eighth graders and nearly 90 percent of tenth graders have reported that it would be fairly easy or very easy to obtain cigarettes and 94 percent of junior and high school students said that it was either easy or only rarely difficult to purchase smokeless tobacco products.

231. Although tobacco companies are aware of the easy access that children and adolescents have to their product, they have taken no serious steps to prevent such distribution. In fact, the tobacco companies have attempted to convey the impression that they wish to discourage sales to minors, without taking any serious action to prevent such sales. Thus, despite the fact that Philip Morris had promised to suspend merchandising payments to merchants caught selling to minors, and despite the fact that Philip Morris had been informed of a number of merchants who were convicted of selling to minors, Philip Morris has admitted that not one merchandising payment in the entire country has been suspended under this program. Instead, the tobacco companies actively encourage such distribution through their advertising and marketing practices.

232. Part of the tobacco companies' marketing strategy is to attract children and adolescents by placing advertising and promotional material in stores located near high schools. In a 1990 memorandum marked "very important," a division manager of RJR ordered its employees to identify stores near high schools and colleges for the purpose of increasing marketing efforts in those locations. This was not an isolated incident but a nationwide policy. In April of that year, another memorandum, from a different RJR manager located in a different region, listed as targets for an increased marketing campaign facilities that are

"located across from, adjacent to are in the general vicinity of High Schools or College Campus."

233. A July 1995 report by the California Department of Health Services found that stores within 1,000 feet of a school had significantly more tobacco advertising and promotions than average. Stores near schools were more likely to have at least one tobacco advertisement placed next to candy or displayed at three feet or below. A significantly higher average number of tobacco advertisements also were found on the exterior of stores located in young neighborhoods -- communities in which at least one-third of the population was 17 years of age or less.

D. FALSE ASSURANCES

234. The tobacco companies have launched a number of campaigns designed to make the public at large believe that they wish to discourage young people from smoking. In reality, such campaigns have the purpose and effect of assuaging parental and governmental concerns while imposing minimal restraints on tobacco companies' ability to continue to market to children and adolescents.

235. In 1965, in response to Federal Trade Commission efforts to regulate cigarette advertising, the cigarette companies created a self-regulatory cigarette advertising and promotional code. The code prohibited testimonials from athletes or other celebrities perceived to appeal to the young, representations that smoking was essential to social success, representations that the healthiness of models was due to cigarette smoking, the use of models who were participating in physical activity or the use of models who were younger, or appeared younger, than 25 years of age. Such guidelines have been routinely ignored and violated. Indeed, four months after the code had been put into effect, Viceroy ads depicted tennis players smoking,

Salem ads utilized images of a young couple playing alongside a waterfall and a television producer admitted to looking for models for cigarette advertisements who were over 25 but appeared to be younger.

236. In late 1980, the Tobacco Institute, on behalf of the tobacco companies, inaugurated a new public relations campaign designed to convince the general public, the federal government and state governments that the tobacco companies wished to discourage young people from using tobacco products. Several tobacco companies began their own campaigns at the same time.

237. In fact, these programs were and are just a continuation of the tobacco companies ongoing campaign of misrepresentation, disinformation and conspiracy. Brochures, like "Tobacco: Helping Youth Say No", are being distributed by the Tobacco Institute and tobacco products manufacturers. In reality, these brochures are a subterfuge designed to promote tobacco products use. The brochure presents tobacco products use as a permissible "adult" decision and as something an "adult" can safely do. The only reason given children for not using tobacco products is that -- like getting married or driving a car -- smoking is for grown ups. Such message really makes the smoking more desirable to kids. An RJR brochure even tells parents to tell their children that the parents smoke "because they enjoy it." None of these brochures disclose that smoking is highly addictive and harmful to human life.

238. The tobacco companies' wrongful conduct has gone on for years and continues to date. In January 1990, in response to letters received from school children, the Manager of Public Relations of RJR wrote the principal of a public school that:

"The tobacco industry is also concerned about the charges being made that smoking is responsible for so many serious diseases. Long before the present criticism began the tobacco industry in a sincere attempt to determine the harmful effects, if any, smoking might have on human health, established the Council for Tobacco Research-USA. The industry has also supported research grants by the American Medical Association. Over the years the tobacco industry has given in excess of $162 million to independent research on the controversies surrounding smoking--more than all voluntary health associations combined.

"Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking. The answers to many unanswered controversies surrounding smoking--and the fundamental causes of the diseases often statistically associated with smoking--we do believe can only be determined through much more scientific research. Our company intends, therefore, to continue to support such research in a continuing search for answers.

We would appreciate your passing this information along to your students . . . . "

VI. THE HEALTH CONSEQUENCES OF TOBACCO USE

239. The human tragedy of tobacco-related disease is practically beyond comprehension. Use of tobacco products is the leading cause of premature death in the United States. According to the Centers for Disease Control and Prevention, each year use of tobacco products kills more than 400,000 Americans, exceeding the combined deaths caused by automobile accidents, AIDS, alcohol use, use of illegal drugs, homicide, suicide and fires. Tobacco-related illnesses account for almost one of every five deaths each year in the United States.

240. At least 43 chemicals in the smoke inhaled by persons consuming the products have been determined to be carcinogenic. Cigarette smoking causes more than 85% of all lung cancer, which has now surpassed breast cancer as the primary cause of death from cancer among women. Smoking is also linked to cancers of the mouth, larynx, esophagus, stomach, pancreas, uterus, cervix, kidney and colon, among others. All told, cigarette smoking is responsible for at least 30% of all deaths from cancer.

241. Smokeless tobacco, including snuff and chewing tobacco, has been shown to cause oral cancer, gum disease and tooth loss. Long term snuff users are 48 times more likely than non-users to develop cancers of the gingiva (gums) and buccal mucosa (cheek) and four times more likely to develop mouth cancer than non-users. Persons using chewing tobacco are six times more likely to develop cancer of the mouth or hypopharynx and three times more likely to develop cancer of the oropharynx than non-users.

242. Smoking is the cause of more than 80% of deaths from pulmonary diseases such as emphysema and bronchitis. These chronic obstructive lung diseases have a

profound social impact because of the extended disability of their victims.

243. Smoking is one of three major independent causes of coronary heart disease. Smoking is also responsible for thousands of deaths from cardiovascular disease, including stroke, heart attack, peripheral vascular disease and aortic aneurysm. Nicotine itself causes cardiovascular problems, including narrowing of blood vessels, increase blood pressure and changes is lipid metabolism which contribute to myocardial infarctions. Using tobacco products is also linked to a large number of other serious illnesses.

244. The health consequences of tobacco products use among women are even more severe than those for men because of the deleterious effect on reproduction. Use of tobacco products reduces fertility, increases the rate of miscarriages and stillbirths, retards uterine fetal growth and results in lower birth weights in infants.

245. The nicotine in tobacco products is addictive. Nicotine is recognized as an addictive substance by such major medical organizations as the Office of the U.S. Surgeon General, the World Health Organization, the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Society of Addiction Medicine, and the Medical Research Council in the United Kingdom. All of these organizations acknowledge tobacco use as a form of drug dependence or addiction with severe adverse health consequences.

246. Despite these adverse health consequences of tobacco products use and the addictive nature of nicotine, the defendants have engaged in the course of conduct alleged herein all to the substantial harm to the State of Connecticut, to its general economy and to its residents.

FIRST COUNT

(UNFAIR AND DECEPTIVE TRADE PRACTICES)

1. - 246. Paragraphs 1 through 246 of this Complaint are incorporated as paragraphs 1 - 246 of this First Count.

247. Each defendant's course of conduct, and defendants' conduct undertaken in concert with each other, as alleged herein, have been undertaken in the conduct of trade or commerce as defined in Conn. Gen. Stat. § 42-110a(4).

248. The defendants, individually and in concert with each other, have made or caused to be made, directly or indirectly, explicitly or by implication, representations which are material, false and likely to mislead consumers, including, but not limited to the following:

a. That defendants would lead an effort to discover and disclose to the public the truth about the health effects of tobacco products use;

b. That use of tobacco products has not been proven to cause and exacerbate diseases;

c. That nicotine contained in tobacco products is not addictive;

d. That the defendants do not exploit or manipulate the nicotine in tobacco products;

e. That the defendants do not target, direct or seek to focus their tobacco products marketing efforts on minors and, in fact, actively discourage sale of those product to minors.

249. Contrary to defendants' representations,

a. Defendants have not been truthful to the public in disclosing the information developed by or otherwise known to them concerning the health hazards of tobacco products

use, including the addictive nature of nicotine. They have systematically suppressed and concealed material information developed by or otherwise known to them concerning the adverse health effects of tobacco products use, including the addictive nature of nicotine, and have engaged in a misinformation and disinformation campaign to conceal the truth. Defendants have further systematically sought falsely to discredit or cast doubt upon scientific studies and reports which concluded that use of tobacco products caused adverse health effects, including the addictive nature of nicotine;

b. Tobacco products use causes a large variety of diseases, including debilitating diseases and diseases that result in death. In furtherance of their deceptive representations about the health effects of tobacco products use, defendants have suppressed the development and commercial production of safer tobacco products;

c. The nicotine contained in tobacco products is addictive;

d. The tobacco companies rely upon the addictive nature of nicotine in designing, marketing and selling tobacco products and manipulate nicotine levels, availability and delivery in order to achieve their design, marketing and sales strategies;

e. Defendants market, distribute and sell tobacco products in a manner that targets children and adolescents and intentionally attracts them to begin or continue to use tobacco products.

250. Defendants' deceptive representations and actions have been and are material, false, and likely to mislead consumers about the adverse health consequences of tobacco products use and the addictive nature of nicotine, and

therefore constitute deceptive acts or practices in violation of Conn. Gen. Stat. § 42-110b(a).

251. Defendants' course of wrongful conduct alleged herein, individually and in concert with each other, violates the public policy of the State of Connecticut in several respects, including by:

a. Engaging in a campaign of misrepresentation, misinformation and disinformation concerning the adverse health consequences associated with tobacco products use and the addictive nature of nicotine in contravention of the public policy of preventing misrepresentations, fraudulent statements and false promises from being made to consumers in the state;

b. Conspiratorially restraining the free flow of truthful material information concerning tobacco products and conspiratorially restraining tobacco product innovation which could reduce or eliminate adverse health consequences associated with tobacco products use and reduce or eliminate the addictive ingredients in tobacco products in contravention of the public policy against agreements in restraint of trade;

c. Insulating themselves from having to pay the health care costs associated with the use of tobacco products and shifting such health care costs to others in contravention of the public policy against intentional and improper interference with public obligations, the public policy of preventing unjust enrichment and the public policy of limiting the State of Connecticut's expense in paying the health care costs for its residents by requiring those that ought to pay such costs to do so.

d. Marketing, distributing and selling tobacco products in a manner that attracts children and adolescents to begin or continue to use tobacco products and which

facilitates their opportunity to do so in contravention of the public policy of preventing children and adolescents from having access to and beginning or continuing to use tobacco products and discouraging their desire to do so and in contravention of the public policy to foster respect for and compliance with the law. In Connecticut, it is illegal to give, sell or deliver tobacco products to persons under the age of 18, and it is illegal for children to purchase tobacco products. Connecticut's public policy is further represented by its mandatory state-wide school curriculum to educate students about and to discourage the use of tobacco products;

e. Marketing, distributing and selling tobacco products in a manner that is likely to and does cause harm to new-born infants by targeting females of pre-childbearing and childbearing age, with the knowledge that such products are addictive and that use of tobacco products during pregnancy results in harm to new-borns, in violation of the public policy of the State of Connecticut to protect and foster the well-being of new-born infants.

252. The defendants' acts and practices as alleged herein have been and are unethical, oppressive and unscrupulous, and cause substantial injury to consumers and others.

253. The defendants' acts and practices, as alleged herein, constitute unfair acts or practices in violation of Conn. Gen. Stat. § 42-110b(a).

254. Defendants' unfair and/or deceptive acts or practices have limited the ability of numerous consumers to obtain or evaluate information material to their decision about the purchase of tobacco products and to obtain safer tobacco products at the lowest possible competitive price.

255. As a further result of defendants' unfair and/or deceptive acts or practices, numerous residents of the State of Connecticut have suffered and will, in the future, suffer adverse health consequences due to use of tobacco products, resulting in substantial health care costs. The State of Connecticut has paid and will continue to be required to pay such health care costs resulting from such adverse health consequences.

256. As a result of defendants' unfair and/or deceptive acts or practices, the defendant tobacco companies have reaped at least hundreds of millions of dollars in ill-gotten profits and gains in Connecticut which they otherwise would not have received and which, in equity, they should be required to disgorge.

257. As a further result of defendants' unfair and/or deceptive acts or practices, children and adolescents have had easy access to and have begun to use, and continue to use, tobacco products, have been encouraged to do so, and their opportunity to do so has been facilitated.

SECOND COUNT
(WILFUL UNFAIR AND DECEPTIVE TRADE PRACTICES)

1. - 257. Paragraphs 1 through 257 of the First Count are incorporated as paragraphs 1 through 257 of this Second Count.

258. Defendants have engaged in, and continue to engage in the unfair and/or deceptive acts or practices alleged herein when they knew or should have known that their conduct was unfair or deceptive in violation of Conn. Gen. Stat. § 42-110(b).

259. Defendants are liable, pursuant to Conn. Gen. Stat. § 42-110o(b), for civil penalties of not more than five thousand dollars for each of their aforesaid violations.

THIRD COUNT
(CONSPIRACY IN RESTRAINT OF TRADE)

1. The Attorney General brings this Count under Conn. Gen. Stat. §§ 35-32, 35-34, 35-35 and 35-38 on behalf of the State of Connecticut, as parens patriae with respect to damages to the general economy of the State of Connecticut, including but not limited to increased health care costs paid by the State of Connecticut for its residents, and as parens patriae for persons residing in the State of Connecticut with respect to economic damages sustained by such persons caused by the purchase and use of tobacco products.

2. - 247. Paragraphs 1 through 246 of this Complaint are incorporated as paragraphs 2 through 247 of this Third Count.

248. Beginning as early as the 1950's, and continuing until the present date, defendants entered into a contract, combination or conspiracy in unreasonable restraint of trade or commerce in the markets for tobacco products in Connecticut in violation of Conn. Gen. Stat. §§ 35-26 and 35-28.

249. This contract, combination or conspiracy had the purpose and effect of:

a. restraining competition in the markets for tobacco products in Connecticut;

b. preventing the loss of sales revenues that would have resulted if the information on the harmful effects of tobacco products use and the addictive effects of nicotine had been made public; and

c. preventing competition among tobacco products manufacturers for the sales and marketing of product

innovations relating to the health effects of tobacco products use.

d. preventing the assumption by the tobacco companies of the health care costs associated with the use of tobacco products that would have resulted if the information on the harmful effects of tobacco products use and the addictive effects of nicotine had been made public.

e. shifting the cost of health care associated with tobacco product use to the health care markets, which costs would otherwise have had to be borne as a cost in the tobacco products markets.

250. As part of the contract, combination and conspiracy, defendants, among other things, agreed to:

a. restrain and suppress research on the health effects of tobacco products use and the addictive nature of nicotine;

b. restrain and suppress the dissemination of information on the harmful effects of tobacco products use and the addictive nature of nicotine;

c. discredit and create doubt concerning the research of others relating to the health effects of tobacco products and the addictive nature of nicotine; and

d. restrain the research, development, marketing and sale of product innovations relating to the health effects of tobacco products use.

251. The aforesaid contract, combination or conspiracy consisted of an agreement, understanding and concert of action among defendants, the substantial terms of which were:

a. withholding of information within the possession and/or knowledge of the defendants about harmful health

effects of tobacco products use and the addictive nature of nicotine;

b. Dissemination of false information promoting tobacco products as harmless and falsely discrediting reports by others to the contrary;

c. Suppression of sponsorship of independent research on the issues of tobacco products use and health;

d. Destruction or concealment of documents and information relating to the health effects of tobacco products use and the addictive nature of nicotine;

e. Intimidation of persons with information about the health effects of tobacco products use and the addictive nature of nicotine in order to prevent, hinder and limit the disclosure of such information;

f. Termination of research and development programs into product innovations related to the health risks associated with tobacco products use;

g. Suppression of sales and marketing of product innovations related to the health risks associated with tobacco products use.

252. In furtherance of their contract, combination or conspiracy, defendants did, without limitation, the following acts:

a. defendant tobacco companies created the Tobacco Industry Research Committee (later known as the Council for Tobacco Research) and the Tobacco Institute, charged with the tasks of disseminating false and misleading information regarding the health risks associated with the use of tobacco products;

b. defendants agreed to suppress independent research regarding the health risks of tobacco products use and the addictive nature of nicotine;

c. defendant tobacco companies destroyed and concealed research and information revealing the health risks of tobacco products use and the addictive nature of nicotine or evidence thereof;

d. defendants jointly sponsored deceptive mass media articles and advertisements intended to deceive the public and public entities about the health risks of tobacco products use and the addictive nature of nicotine;

e. defendant tobacco companies made false representations concerning their commitment to sponsor and make public "objective" scientific information regarding the relationship between health and tobacco products use;

f. defendant tobacco companies agreed to halt, limit, stifle and arrest research, development, marketing and sales of product innovations related to the health risks associated with tobacco products use.

253. As a result of the foregoing, the public has been misinformed and misled concerning the nature and health consequences of use of tobacco products and has been deprived of the availability of safer tobacco products, all of which has restrained competition and has had an effect on the volume of cigarettes purchased by the public and the prices charged by the defendants and has affected the allocation of resources in the economy within the State of Connecticut.

254. The State of Connecticut and its residents have suffered injury as a result of the aforesaid unlawful conspiracy.

255. The effect of this unlawful conspiracy has been to limit the ability of residents of the State of Connecticut to obtain information material to their decision about purchase of tobacco products and to obtain safer tobacco products at the lowest possible competitive price. As a result, residents

of the State of Connecticut have used and continue to use more dangerous tobacco products than they otherwise would have and have paid higher prices for them.

256. Defendants' conduct has damaged the general economy of the State of Connecticut by:

a. diverting money that would otherwise be employed in other more competitive sectors of the economy;

b. causing higher rates of illness and death among the residents of the state which historically have been paid for by other sectors of the economy;

c. reducing the productivity of a large segment of the workforce of the State of Connecticut; and

d. requiring the State of Connecticut to expend monies for health care costs for tobacco-related illnesses.

257. Defendants' conspiracy and concert of action were taken with the express purpose and effect of imposing the payment of the costs of health care for tobacco-related illnesses on health care providers and payors such as the State of Connecticut and preventing the assumptions of those costs within the tobacco products markets.

258. The aforesaid unlawful conspiracy and the effects thereof are continuing and will continue unless the injunctive relief sought by the plaintiff is granted.

FOURTH COUNT
(UNDERTAKING OF AND WILFUL FAILURE TO PERFORM A SPECIAL DUTY)

1. - 246. Paragraphs 1 through 246 of this Complaint are incorporated as paragraphs 1 through 246 of this Fourth Count.

247. Commencing in January 1954 and continuing to the present, defendants, individually and in concert, have

represented that they would undertake a special responsibility and duty to residents of the State of Connecticut, and those who advance and protect the public health, to accept an interest in the public's health as a basic and paramount responsibility; to cooperate closely with those who safeguard the public health; to aid and assist the research effort into all aspects of tobacco use and human health; to continue to research and otherwise undertake all possible efforts to learn all the facts and to discover the truth about use of tobacco products and health; and finally, to disclose to the State of Connecticut and its residents complete and accurate information about the effects of the use of tobacco products on human health.

248. Defendants undertook to render such services, individually and in concert, recognizing that they were necessary for the protection of the public health, including the health of millions of Connecticut residents.

249. Defendants have wilfully and wantonly failed to fulfill and knowingly disregarded and violated the special responsibility and duty they assumed, and continue to do so to the present.

250. Defendants' failure to fulfill the special responsibility and duty that they voluntarily undertook to perform has caused harm to the public and the State of Connecticut, and has increased the risk of harm to the public and damages of the State of Connecticut, including the cost of health care for the State of Connecticut above and beyond what it would have been had defendants not undertaken and failed to fulfill such special responsibility and duty.

251. As a result of defendants' conduct, the State of Connecticut has suffered and will continue to suffer substantial injuries and damages for which the State of Connecticut is entitled to relief.

FIFTH COUNT
(UNDERTAKING AND NEGLIGENT PERFORMANCE OF SPECIAL DUTY)

1. - 248. Paragraphs 1 through 248 of the Fourth Count are incorporated as paragraphs 1 -248 of this Fifth Count.

249. Defendants, individually and in concert, have failed to fulfill and continue to fail to fulfill and breach the special responsibility and duty they assumed.

250. Defendants' failure to use due care in performing the special responsibility and duty that they voluntarily undertook to perform has caused harm to the public and the State of Connecticut, and has increased the risk of harm to the public and damages of the State of Connecticut, including the cost of health care for the State of Connecticut above and beyond what it would have been had defendants not undertaken and failed to perform such special responsibility and duty properly.

251. As a result of defendants' conduct, the State of Connecticut has suffered and will continue to suffer substantial injuries and damages for which the State of Connecticut is entitled to relief.

SIXTH COUNT
(UNJUST ENRICHMENT)

1. - 246. Paragraphs 1 through 246 of this Complaint are incorporated as paragraphs 1 - 246 of this Sixth Count.

247. The defendant tobacco companies have each reaped enormous profits and gains from the sale of tobacco products in Connecticut.

248. The defendant tobacco companies' tobacco products sales in Connecticut have resulted in enormous

increases in health care costs directly attributable to the use of the tobacco products sold by these defendants.

249. Defendants undertook the wrongful conduct alleged herein for the purpose of increasing their sales, and profits from their sales, of tobacco products while at the same time avoiding liability for the health care costs caused by such sale and use of tobacco products and shifting those costs to the State of Connecticut and others.

250. Without justification, defendants have refused and failed to pay for the consequences of their unlawful conduct, and, as a result, the State of Connecticut has been required to pay for the medical costs resulting from defendants' unlawful conduct.

251. The State of Connecticut's expenditure of substantial sums to pay for the costs of medical care for health problems resulting from the use of tobacco products sold, for enormous profit, by defendants has unjustly enriched the defendants at the expense of the State of Connecticut.

252. By virtue of the foregoing, the State of Connecticut has borne a duty that, in law, equity and fairness, ought to have been borne by defendants.

253. Defendants have unjustly enriched themselves at the expense of the State of Connecticut.

254. As a result of defendants' conduct, the State of Connecticut has suffered and will continue to suffer substantial injuries and damages for which the State of Connecticut is entitled to recovery.

SEVENTH COUNT
(INTERFERENCE WITH OBLIGATION)

1. - 246. Paragraphs 1 through 246 of this Complaint are incorporated as paragraphs 1 - 246 of this Seventh Count.

247. The State of Connecticut has, for over 350 years, undertaken an obligation to pay health care and other costs of many of its residents. The State of Connecticut's obligation is a matter of public record and was well-known to defendants in 1953 and at all times thereafter.

248. Through the conduct alleged herein, the defendants individually and in concert, have intentionally and improperly interfered with the State of Connecticut's obligation by making its performance of that obligation more expensive and burdensome than it otherwise would have been.

249. Defendants' interference with the obligation of the State of Connecticut to pay such health care and other costs was carried out through the use of fraud, misrepresentation and deceit and with malicious intent. Defendants engaged in the conduct herein alleged to mislead and confuse the residents of Connecticut about the health consequences of the use of tobacco products and the addictive nature of nicotine. The purpose and effect of defendants' conduct was to shift to others, including the State of Connecticut, the health care and other costs resulting from the health consequences of tobacco products use.

250. Defendants' intentional and improper conduct increased the degree and extent of tobacco-related disease and death among Connecticut residents over that which otherwise would have existed. Defendants knew with substantial certainty that their conduct would increase the burden and obligation of the State of Connecticut to pay for the health care costs caused by such tobacco-related disease and death.

251. As a result of defendants' conduct, the State of Connecticut has suffered and will continue to suffer

substantial injuries and damages for which the State of Connecticut is entitled to relief.

RELIEF REQUESTED

WHEREFORE, the State of Connecticut requests that this Court issue and order judgment against the defendants, as follows:

A. As to the First Count:

1. Permanently enjoining each defendant from continuing the deceptive and/or unfair acts or practices complained of herein.

2. Ordering each defendant to disclose all research and studies in its possession, including such research and studies previously conducted directly or indirectly by it, its respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to the issue of tobacco products and health and addiction.

3. Ordering each defendant to fund a corrective public education campaign to remedy the unfair and deceptive acts and practices complained of herein, administered and controlled by the State of Connecticut or such other independent third party at the Court may deem appropriate.

4. Ordering each defendant to fund tobacco products use cessation programs, including the provision of nicotine replacement therapy for dependent tobacco products users, administered and controlled by the State of Connecticut or such other independent third party at the Court may deem appropriate.

5. Ordering each defendant to cease all marketing and sales practices that encourage children and adolescents

to begin or continue to use tobacco products or facilitate their opportunity to do so.

6. Ordering each defendant to disgorge all profits and gains achieved in whole or in part through the unfair and/or deceptive acts or practices complained of herein.

7. Ordering each defendant to pay restitution.

8. Awarding actual damages and compensation to the State of Connecticut for past and future damages, including but not limited to health care expenditures, caused by the defendants' unfair and/or deceptive acts or practices, together with interest and costs.

9. Awarding punitive damages.

10. Awarding the State of Connecticut reasonable attorneys' fees and costs, pursuant to Conn. Gen. Stat. § 42-110m(a).

11. Granting such other and further relief as this Court deems equitable and proper.

B. <u>As to the Second Count</u>:

1. Civil penalties in the amount of Five Thousand Dollars for each wilful violation of Conn. Gen. Stat. § 42-110b, pursuant to Conn. Gen. Stat. § 42-110o.

2. Awarding the State of Connecticut reasonable attorneys' fees and costs, pursuant to Conn. Gen. Stat. § 42-110m(a).

C. <u>As to the Third Count</u>:

1. Permanently enjoining each defendant from continuing the unlawful acts and conspiracy in restraint of trade complained of herein.

2. Ordering each defendant to disclose all research and studies in its possession, including such research and studies previously conducted directly or indirectly by it, its

respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to the issue of tobacco products and health and addiction.

3. Awarding actual damages and compensation to the State of Connecticut, as parens patriae for the residents of the State of Connecticut, for past and future damages caused by the defendants' unlawful acts and conspiracy in restraint of trade, together with interest and costs.

4. Awarding actual damages and compensation to the State of Connecticut for the past and future damages to the general economy of the State of Connecticut, including but not limited to health care expenditures, caused by the defendants' unlawful acts and conspiracy in restraint of trade.

5. Awarding treble damages pursuant to Conn. Gen. Stat. § 35-35.

6. Ordering defendants to pay civil penalties to the State of Connecticut pursuant to Conn. Gen. Stat.§ 35-38.

7. Awarding the State of Connecticut reasonable attorneys' fees and costs, pursuant to Conn. Gen. Stat. §§ 35-34 and 35-35.

8. Granting such other and further relief as this Court deems equitable and proper.

D. <u>As to the Fourth Count</u>:

1. Ordering each defendant to disclose all research and studies in its possession, including such research and studies previously conducted directly or indirectly by it, its respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to the issue of tobacco products and health and addiction.

2. Ordering each defendant to fund a corrective public education campaign to remedy its failure to fulfill the duty it assumed, to administered and controlled by the State of Connecticut or such other independent third party at the Court may deem appropriate.

3. Ordering each defendant to fund tobacco products use cessation programs, including the provision of nicotine replacement therapy for dependent tobacco products users, administered and controlled by the State of Connecticut or such other independent third party at the Court may deem appropriate.

4. Ordering each defendant to disgorge all profits and gains achieved in whole or in part through its breach of the special responsibility and duty it assumed.

5. Ordering each defendant to pay restitution.

6. Awarding actual damages and compensation to the State of Connecticut for past and future damages, including but not limited to health care expenditures, caused by the defendants' breach of the special responsibility and duty they individually and jointly assumed, together with interest and costs.

7. Awarding punitive damages.

8. Granting such other and further relief as this Court deems equitable and proper.

E. <u>As to the Fifth Count:</u>

1. Ordering each defendant to disclose all research and studies in its possession, including such research and studies previously conducted directly or indirectly by it, its respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to the issue of tobacco products and health and addiction.

2. Ordering each defendant to fund a corrective public education campaign to remedy its failure to fulfill the duty it assumed, administered and controlled by the State of Connecticut or such other independent third party at the Court may deem appropriate.

3. Ordering each defendant to fund tobacco products use cessation programs, including the provision of nicotine replacement therapy for dependent tobacco products users, administered and controlled by the State of Connecticut or such other independent third party at the Court may deem appropriate.

4. Ordering each defendant to disgorge all profits and gains achieved in whole or in part through its willful and wanton breach of the special responsibility and duty it assumed.

5. Ordering each defendant to pay restitution.

6. Awarding actual damages and compensation to the State of Connecticut for past and future damages, including but not limited to health care expenditures, caused by the defendants' willful and wanton breach of the special responsibility and duty they individually and jointly assumed, together with interest and costs.

7. Granting such other and further relief as this Court deems equitable and proper.

F. <u>As to the Sixth Count:</u>

1. Ordering restitution and/or disgorgement by each defendant of the unjust benefit it has received from its wrongful conduct, together with interest and costs.

2. Awarding damages to the State of Connecticut for the injuries and loss incurred by virtue of defendants' unjust enrichment at the expense of the State of Connecticut, together with interest and costs.

3. Awarding punitive damages.

4. Granting such other and further relief as this Court deems equitable and proper.

G. <u>As to the Seventh Count:</u>

1. Permanently enjoining each defendant from interfering, as alleged herein, with the State of Connecticut's obligation to pay the health care costs of its residents.

2. Awarding actual damages and compensation to the State of Connecticut for past and future damages, including but not limited to health care expenditures, caused by the defendants' individual and joint interference with obligation, together with interest and costs.

3. Awarding punitive damages.

4. Granting such other and further relief as this Court deems equitable and proper.

PLAINTIFF STATE OF
CONNECTICUT,

s/ Richard Blumenthal
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ATTORNEY GENERAL
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HARTFORD, CT 06106
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s/ David S. Golub
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(215) 875-3000

STATEMENT OF AMOUNT IN DEMAND

The plaintiff claims monetary damages against the defendants in excess of Fifteen Thousand ($15,000.00) Dollars, together with the costs of this action.

Dated at Hartford, Connecticut this 18th day of July, 1996.

PLAINTIFF STATE OF CONNECTICUT,

RICHARD BLUMENTHAL
ATTORNEY GENERAL
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TO THE CLERK:

PLEASE ENTER THE FOLLOWING APPEARANCE:

RICHARD BLUMENTHAL
ATTORNEY GENERAL
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JURIS NO. 301425

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JURIS NO. 58005, FOR THE PLAINTIFF.

Sec. 3-125. Duties of Attorney General; deputy; assistants; associate attorneys general.

The Attorney General shall appoint a deputy, who shall be sworn to the faithful discharge of his duties and shall perform all the duties of the Attorney General in case of his sickness or absence. He shall appoint such other assistants as he deems necessary, subject to the approval of the Governor. The Attorney General may also appoint not more than four associate attorneys general who will serve at the pleasure of the Attorney General and will be exempt from the classified service. The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the Governor, the Lieutenant Governor, the Secretary, the Treasurer and the Comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters, high sheriffs or their chief deputies, except in such matters for which high sheriffs or their chief deputies are insured or required to be insured by the general statutes, and institutions and for the State Librarian in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question, and for all members of the state House of Representatives and the state Senate in all suits and other civil proceedings brought against them involving their official acts and doings in the discharge of their duties as legislators, in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction. When any measure affecting the State Treasury is pending before any committee of the General Assembly, such committee shall give him reasonable notice of the

pendency of such measure, and he shall appear and take such action as he deems to be for the best interests of the state, and he shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. All legal services required by such officers and boards in matters relating to their official duties shall be performed by the Attorney General or under his direction. All writs, summonses or other processes served upon such officers and legislators shall, forthwith, be transmitted by them to the Attorney General. All suits or other proceedings by such officers shall be brought by the Attorney General or under his direction. He shall, when required by either house of the General Assembly or when requested by the president pro tempore of the Senate, the speaker of the House of Representatives, or the majority leader or the minority leader of the Senate or House of Representatives, give his opinion upon questions of law submitted to him by either of said houses or any of said leaders. He shall advise or give his opinion to the head of any executive department or any state board or commission upon any question of law submitted to him. He may procure such assistance as he may require. Whenever a trustee, under the provisions of any charitable trust described in section 45a-514, is required by statute to give a bond for the performance of his duties as trustee, the Attorney General may cause a petition to be lodged with the probate court of the district in which such trust property is situated, or where any of the trustees reside, for the fixing, accepting and approving of a bond to the state, conditioned for the proper discharge of the duties of such trust, which bond shall be filed in the office of such probate court. The Attorney General shall prepare a topical and chronological cross-index of all legal opinions issued by the office of the Attorney General and shall, from time to time, update the same.

Sec. 35-32. Attorney General to bring actions in the name of state or as parens patriae.

(a) The Attorney General, in the name of the state and on behalf of the people of the state, shall enforce the provisions of this chapter. He shall investigate suspected violations and institute proceedings, for any violation of the provisions of this chapter. Such proceedings may pray that such violation be temporarily or permanently enjoined, or otherwise prohibited.

(b) The Attorney General may also, in his discretion, intervene and appear in any proceeding pending before any court, agency, board, or commission in this state in which matters related to this chapter are in issue.

(c) The Attorney General may also, in enforcing the provisions of this chapter, bring an action in the name of the state as (1) parens patriae for persons residing in the state with respect to damages sustained by such persons, or, if the court finds in its discretion that the interests of justice so require, as a representative of a class or classes consisting of persons residing in the state who have been damaged; or (2) parens patriae with respect to damages to the general economy of the state or any political subdivision thereof; provided that such damages shall not be duplicative of those recoverable under subdivision (1) of this subsection.

(d) The Attorney General may also bring a civil action in the name of the state in the district courts of the United States under the federal antitrust laws to recover damages and secure such other relief as provided for in such laws as (1) parens patriae for persons residing in the state with respect to damages sustained by such persons, or, if the court finds in its discretion that the interests of justice so require, as a representative of a class or classes consisting of

persons residing in the state who have been damaged; or (2) parens patriae with respect to damages to the general economy of the state or any political subdivision thereof; provided that such damages shall not be duplicative of those recoverable under subdivision (1) of this subsection.

Sec. 35-42. Subpoena power. Written interrogatories. Civil penalties. Federal and interstate cooperation.

(a) Whenever the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, has reason to believe that any person has violated any of the provisions of this chapter, he may, prior to instituting any action or proceeding against such person, issue in writing and cause to be served upon any person, by subpoena duces tecum, a demand requiring such person to submit to him documentary material relevant to the scope of the alleged violation.

(b) Such demand shall (1) state the nature of the alleged violation, and (2) describe the class or classes of documentary material to be reproduced thereunder with such definiteness and certainty as to be accurately identified, and (3) prescribe a date which would allow a reasonable time to assemble such documents for compliance.

(c) All documents furnished to the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, shall be held in the custody of the Attorney General, or his designee, shall not be available to the public, and shall be returned to the person at the termination of the attorney general's investigation or final determination of any action or proceeding commenced thereunder.

(d) No such demand shall require the submission of any documentary material, the contents of which would be privileged, or precluded from disclosure if demanded in a grand jury investigation.

(e) The Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, may during the course of an investigation of any violations of the provisions of this chapter by any person (1) issue in

writing and cause to be served upon any person, by subpoena, a demand that such person appear before him and give testimony as to any matters relevant to the scope of the alleged violations. Such appearance shall be under oath and a written transcript made of the same, a copy of which shall be furnished to said person appearing, and shall not be available for public disclosure; and (2) issue written interrogatories prescribing a return date which would allow a reasonable time to respond, which responses shall be under oath and shall not be available for public disclosure.

(f) In the event any person shall fail to comply with the provisions of this section, (1) the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, may apply to the superior court for the judicial district of Hartford-New Britain * for compliance, which court may, upon notice to such person, issue an order requiring such compliance, which shall be served upon such person; (2) the Attorney General, his deputy, or any assistant attorney general designated by the Attorney General, may also apply to the superior court for the judicial district of Hartford-New Britain * for an order, which court may, after notice to such person and hearing thereon, issue an order requiring the payment of civil penalties to the state in an amount not to exceed five hundred dollars.

(g) The Attorney General shall cooperate with officials of the federal government and the several states, including but not limited to the sharing and disclosure of information and evidence obtained under the purview of this chapter.

(h) Service of subpoenas ad testificandum, subpoenas duces tecum, notices of deposition, and written interrogatories, as provided herein, may be made by: (1) Personal service or service at the usual place of abode; or (2) by registered or certified mail, return receipt requested,

a duly executed copy thereof addressed to the person to be served at his principal place of business in this state, or, if said person has no principal place of business in this state, to his principal office, or to his residence.

Sec. 42-110d. Investigation. Hearing. Orders. Enforcement. Disclosure of information.

(a) For the purposes of this chapter the commissioner shall have the power to order an investigation and examination to be made. In addition to other powers conferred upon the commissioner by this chapter, the commissioner or his authorized representatives may issue subpoenas to any person involved in any matter under investigation and examination, administer an oath or affirmation to any person, and conduct hearings in aid of any investigation or examination, provided none of the powers conferred by this chapter shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture.

(b) Said commissioner or his authorized representatives shall have the right to (1) enter any place or establishment within the state, at reasonable times, for the purpose of making an investigation; (2) check the invoices and records pertaining to costs and other transactions of commodities; (3) take samples of commodities for evidence upon tendering the market price therefor to the person having such commodity in his custody; (4) subpoena documentary material relating to such investigation; and (5) have access to, for the purpose of examination, documentary material and the right to copy such documentary material of any person being investigated or proceeded against. The commissioner or his authorized representatives shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary material relating to any matter under investigation.

(c) In addition to other powers conferred upon the commissioner, said commissioner may execute in writing and cause to be served by certified mail an investigative demand upon any person suspected of using, having used or

about to use any method, act or practice declared by section 42-110b to be unlawful or upon any person from whom said commissioner wants assurance that section 42-110b has not, is not or will not be violated. Such investigative demand shall contain a description of the method, act or practice under investigation, provide a reasonable time for compliance, and require such person to furnish under oath or otherwise, as may be specified in said demand, a report in writing setting forth relevant facts or circumstances together with documentary material.

(d) Said commissioner, in conformance with sections 4-176e to 4-185, inclusive, whenever he has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter, shall mail to such person, by certified mail, a complaint stating the charges and containing a notice of a hearing, to be held upon a day and at a place therein fixed at least fifteen days after the date of such complaint. The person so notified shall have the right to file a written answer to the complaint and charges therein stated and appear at the time and place so fixed for such hearing, in person or otherwise, with or without counsel, and submit testimony and be fully heard. Any person may make application, and upon good cause shown shall be allowed by the commissioner to intervene and appear in such proceeding by counsel or in person. The testimony in any such proceeding, including the testimony of any intervening person, shall be under oath and shall be reduced to writing by the recording officer of the hearing and filed in the office of the commissioner. The commissioner or his authorized representatives shall have the power to require by subpoena the attendance and testimony of witnesses and the production of any documentary material at such proceeding. If upon such hearing the commissioner is of the opinion that the method of competition or the act or

practice in question is prohibited by this chapter, the commissioner shall make a report in writing to the person complained of in which he shall state his findings as to the facts and shall forward by certified mail to such person an order to cease and desist from using such methods of competition or such act or practice, or, if the amount involved is less than five thousand dollars, an order directing restitution, or both. The commissioner may apply for the enforcement of any cease and desist order, order directing restitution or consent order issued under this chapter to the superior court for the judicial district of Hartford-New Britain *, or to any judge thereof if the same is not in session, for orders temporarily and permanently restraining and enjoining any person from continuing violations of such cease and desist order, order directing restitution or consent order. Such application for a temporary restraining order, temporary and permanent injunction, order directing restitution and for such other appropriate decree or process shall be brought and the proceedings thereon conducted by the Attorney General.

(e) In addition to any injunction issued pursuant to subsection (d) of this section, the court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practices prohibited by this chapter, including the appointment of a receiver or the revocation of a license or certificate authorizing the person subject to the order or injunction to engage in business in this state, or both.

(f) The commissioner or the Attorney General or their employees shall disclose, in accordance with the provisions of chapter 3, all records concerning the investigation of any alleged violation of any provision of this chapter, including, but not limited to, any complaint initiating an investigation and all records of the disposition or settlement of a

complaint. For purposes of this section, "disposition" shall include the following action or nonaction with respect to any complaints or investigations: (A) No action taken because of (i) a lack of jurisdiction; (ii) unsubstantiated allegations or (iii) a lack of sufficient information to draw a conclusion, as determined by the commissioner, after investigation; (B) referral to another state agency, or to a federal or local agency, or to law enforcement authorities; (C) an acceptance of an assurance of voluntary compliance in accordance with the provisions of section 42-110j; and (D) formal action taken, including the institution of administrative proceedings pursuant to subsection (d) of this section or court proceedings pursuant to section 42-110m, 42-110o or 42-110p. The commissioner may withhold such records from disclosure during the pendency of an investigation or examination held in accordance with subsection (a) of this section, but in no event shall the commissioner withhold any such records longer than a period of eighteen months after the date on which the initial complaint was filed with the commissioner or after the date on which the investigation or examination was commenced, whichever is earlier. Nothing herein shall be deemed to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state.

Sec. 42-110g. Action for damages. Class actions. Costs and fees. Equitable relief. Jury trial.

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this section may, pursuant to rules established by the judges of the Superior Court, bring a class action on behalf of themselves and other persons similarly situated who are residents of this state or injured in this state to recover damages.

(c) Upon commencement of any action brought under subsection (a) of this section, the plaintiff shall mail a copy of the complaint to the Attorney General and the Commissioner of Consumer Protection and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the Attorney General and the Commissioner of Consumer Protection.

(d) In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. In a class action in which there is no monetary recovery, but other relief is granted on behalf of a class, the court may award, to the

plaintiff, in addition to other relief provided in this section, costs and reasonable attorneys' fees. In any action brought under this section, the court may, in its discretion, order, in addition to damages or in lieu of damages, injunctive or other equitable relief.

(e) Any final order issued by the Department of Consumer Protection and any permanent injunction, final judgment or final order of the court made under section 42-110d, 42-110m, 42-110o or 42-110p shall be prima facie evidence in an action brought under this section that the respondent or defendant used or employed a method, act or practice prohibited by section 42-110b, provided this section shall not apply to consent orders or judgments entered before any testimony has been taken.

(f) An action under this section may not be brought more than three years after the occurrence of a violation of this chapter.

(g) In any action brought by a person under this section there shall be a right to a jury trial except with respect to the award of punitive damages under subsection (a) of this section or the award of costs, reasonable attorneys' fees and injunctive or other equitable relief under subsection (d) of this section.

Sec. 42-110k. Commissioner's enforcement powers.

Court orders. If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the commissioner or his authorized representatives, the commissioner may, after notice, apply to the superior court for the judicial district of Hartford-New Britain *, which court, after a hearing thereon, may issue an order: (1) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any commodity or the conduct of any trade or commerce that is involved in the alleged or suspected violation; (2) vacating, annulling or suspending the corporate charter of a corporation created by or under the laws of Connecticut or revoking or suspending the certificate of authority to do business in this state of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and (3) granting such other relief as may be required, until the person files the statement or report, or obeys the subpoenas or investigative demand. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

Sec. 42-110m. Restraining orders or injunctions. Relief.

(a) Whenever the commissioner has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter said commissioner may proceed as provided in sections 42-110d and 42-110e or may request the Attorney General to apply in the name of the state of Connecticut to the Superior Court for an order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution and the appointment of a receiver in appropriate instances, or both. Proof of public interest or public injury shall not be required in any action brought pursuant to section 42-110d, section 42-110e or this section. The court may award the relief applied for or so much as it may deem proper including reasonable attorney's fees, accounting and such other relief as may be granted in equity. In such action the commissioner shall be responsible for all necessary investigative support.

(b) Nothing contained in this chapter shall be construed as a limitation upon the power or authority of the state, the attorney general or the commissioner to seek administrative, legal or equitable relief as provided by other statutes or at common law.

Sec. 42-110n. Consent orders.

(a) In the administration of this chapter, the commissioner, any time after the issuance of a complaint provided for in subsection (d) of section 42-110d, may accept an agreement by any person charged with violating the provisions of section 42-110b to enter into a written consent order in lieu of an adjudicative hearing. The acceptance of a consent order shall be within the complete discretion of the commissioner or such presiding officer as had been designated by the commissioner.

(b) The consent order provided for in subsection (a) of this section shall contain: (1) An admission of all jurisdictional facts; (2) an express waiver of the right to seek judicial review or otherwise to challenge or contest the validity of the order; (3) a provision that the complaint may be used in construing the terms of the consent order; (4) a statement that the consent order shall have the same force and effect as an order entered after a full hearing and shall become final when issued; (5) a specific assurance of discontinuance of each of the acts alleged in the complaint; (6) the signature of each of the individual respondents or his counsel; and (7) the signature of the commissioner or of his authorized representative.

(c) Negotiations leading up to the acceptance of a consent order are not open to the public. The consent order itself is a matter of public record.

(d) A consent order shall have the same force and effect as a cease and desist order issued pursuant to subsection (d) of section 42-110d.

Supreme Court, U.S.
F I L E D
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CLERK

No. 97-1399

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT
PETITIONER

v.

PHILIP MORRIS, INC., ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF MASSACHUSETTS, FORTY-FIVE STATES, THE DISTRICT OF COLUMBIA, GUAM, AND THE COMMONWEALTHS OF THE NORTHERN MARIANAS ISLANDS AND PUERTO RICO, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The *amici curiae* Commonwealth of Massachusetts and the states identified on the cover, by and through their attorneys general, respectfully submit this brief in support of the Petition for Writ of Certiorari of Richard Blumenthal, Attorney General of Connecticut.

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971). The States have an interest in the Petition because the decision of the Court of Appeals deals a heavy blow to the comity served by *Younger* abstention.

These States all have consumer protection and antitrust statutes to protect the welfare of their citizens and the integrity of their economies, and the attorneys general of the States are charged with enforcing these laws.[1] The States, through their

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[1] *See, e.g.*, Ala. Code §8-18-1; Alaska Stat. §45.50.471; Ariz. Rev. Stat. Ann. §44-1521 (misdemeanor penalties in certain cases); Ark. Code Ann. §4-88-101(criminal penalties in certain cases); Cal. Bus. & Prof. Code §§17200, 17500 ; Colo. Rev. Stat. §6-1-101 §6-1-114 (criminal penalties in certain cases); Conn. Gen. Stat. §42-110a; Del. Code Ann. Tit. 6 §§ 2511, 2531; D.C. Code Ann. §28-3901; Fla. Stat. Ann. §501.201; Ga. Code Ann. §10-1-390; Haw. Rev. Stat. §480; Idaho Code §48-601; Ill. Comp. Stat. Ann. §505/1 et. seq.; Ind. Code Ann. §24-5-0.5-1; Iowa Code Ann. §714.16; Kan. Stat. Ann. §50-623; Ky. Rev. Stat. §367.110; La. Rev. Stat. Ann. §51:1401; Md. Com. Law Code Ann. §§13-101, 14-101 (criminal penalties in certain cases); Mass. Gen. Laws Ann., c.93A; Mich. Comp. Laws Ann. §445.901; Minn. Stat. Ann. §8.31, §325D.44, §325F.69; Miss. Code Ann. §75-24-1 (criminal penalties in certain cases); Mo. Rev. Stat. §407.010 (criminal penalties in certain cases); Mont. Code Ann. §30-14-101 (criminal penalties in certain cases); Neb. Rev. Stat. §59-1601, §87-301 (criminal penalties in certain cases); Nev. Rev. Stat. §§41.600, 598.0903; N.H. Rev. Stat. Ann. §358-A:1; N.J. Stat. Ann. §56:8-1; N.M. Stat. Ann. §57-12-1; N.Y. Gen. Bus. Law §§349, 350; N.C. Gen. Stat. §75-1.1 (criminal penalties in certain cases); N.D. Gen. Stat. §51-15-01; Ohio

attorneys general, frequently bring enforcement actions in state courts seeking both injunctive relief and monetary damages against those engaged in unfair or deceptive conduct in trade and commerce. The judiciaries of the States frequently issue judgments in these actions, enjoining defendants' illegal conduct, and awarding penalties, restitution, disgorgement of ill-gotten gains, attorney's fees and costs to the states and harmed consumers. Such actions are brought on behalf of the States in the public interest, and the attorneys general represent their sovereign state, and not the individuals harmed.

The States respectfully request that the Court grant the Connecticut Attorney General's Petition for Writ of Certiorari. *Cf. New York v. United States*, 326 U.S. 572, 574-5 (1945) ("The strong urging of New York for further clarification of the amenability of the States to the taxing power of the United States led us to grant certiorari...The argument pressed by New York and the forty-five other States who, as *amici curiae*, have joined her deserves an answer."); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982) ("Because of the unusually broad and novel view... adopted by the Court of

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Rev. Code Ann. §1345.01; Okla. Stat. Ann. Tit. 15 §751 (criminal penalties in certain cases); Or. Rev. Stat. §646.605; Pa. Stat. Ann. Tit. 73 §201-1; R.I. Gen. Law §6-13.1-1; S.C. Code Ann. §39-5-10; S.D. Cod. Laws Ann. §37-24-1 (criminal penalties in certain cases);Tenn. Code Ann. §47-18-101 (criminal penalties in certain cases); Tex. Bus. & Com. Code Ann. §17.41 (criminal penalties in certain cases, including concealing evidence); Utah Code Ann. §§13-2-1, 13-5-1, 13-11-1; Vt. Stat. Ann. tit. 9 §2451; Va. Code §59.1-196; Wash. Rev. Code Ann. §19.86, et. seq.; W. Va. Code §46A-6-101; Wis. Stat. Ann. §100.18 (criminal penalties in certain instances); Wis. Stat. Ann. §§100.20, 100-24, 100-26; Wyo. Stat. §40-12-101.

For citations to each state criminal and civil antitrust laws, see Ross, *State Attorneys General Powers and Responsibilities*, Appendix K, at 407-411 (1990).

Appeals, we granted certiorari.")

SUMMARY OF ARGUMENT

The issue in this case is whether Connecticut's action to enforce its laws against the tobacco companies implicates important state interests.[2] The Court should grant Petitioner's Petition for Writ of Certiorari because the decision below departs from this Court's jurisprudence and invites pre-emptive federal court speculation about the "primary aim" of not only the actions pending in over forty States against the tobacco companies, but of virtually every action brought by the States to enforce their consumer protection and antitrust laws, as well to enforce a host of other laws to protect the welfare of the citizens of each state.

In assessing the nature of the state interest for purposes of *Younger* abstention, the Court of Appeals gave short shrift to Connecticut's Complaint in the pending state enforcement action,[3] speculated without support that the "primary aim" of the State was to recover money for its Medicaid program, and gave insufficient weight to the interest of the States and their attorneys general in protecting the public and their respective

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[2] Where a federal plaintiff seeks to interfere with a state judicial proceeding, the federal court should abstain under *Younger* if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity for the federal plaintiff to raise any federal constitutional challenges. *Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982).

[3] *State of Connecticut v. Philip Morris, Inc, et. al.*, Docket No. CV 96-0072414 S (Judicial District of Litchfield). The defendants in that case, and the federal plaintiffs in the case below, are referred to herein as "the tobacco companies."

States from illegal conduct in business and trade. The Court of Appeal's re-casting of the State's case raises particularly grave concerns for the States because the action pending in the Connecticut state court implicates a vital state interest in the health and safety of its citizens, their protection against fraud and deception, and the economic well-being of the State.

The Court of Appeals's erroneous interpretation rests on two points viewed by the court as evidence that Connecticut's case "is not a generic proceeding of great importance to the state:" (1) the state sought "money damages;" and (2) private parties also could maintain actions under the state's consumer protection and antitrust statutes. (A11) Allowing these two points to be the measure of the State's interest in its judicial proceedings would shatter the foundations of state enforcement of consumer protection and antitrust laws, and the respect due such laws and proceedings under *Younger*.

When defendants, such as the tobacco companies in the Connecticut proceeding, invite the federal courts to interfere with these state enforcement proceedings, regardless of whether the State seeks money damages for state residents or state agencies, "proper respect for state functions" requires that the federal courts decline the invitation, and abstain. *Younger*, 401 U.S. at 44.

REASONS FOR GRANTING REVIEW

1. By Its Departure From This Court's Approach to State Interest Analysis, The Decision Below Creates an Unprecedented "Money Damages Exception" to the Younger Abstention Doctrine

This Court has never held that where a State brought a judicial proceeding, the state interest was of insufficient magnitude to justify *Younger* abstention.[4] Yet, the Court of Appeals concluded that the State of Connecticut has an insufficient interest in its enforcement action pending before

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[4] Indeed, in *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1,10 (1987), the Court held that *Younger* abstention warranted a dismissal of Texaco's federal challenge to the application of Texas's appellate bond requirements because "significant interests [would be] harmed by [the federal courts'] intrusion into the Texas judicial system." The State was not a party in this case, and even "expressly represented to the Court of Appeals that it 'has no interest in the outcome of the state-court adjudication underlying this cause,' except in its fair adjudication." 481 U.S. at 19 (Brennan, J., dissenting).

In *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996), involving abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), rather than under *Younger*, the Court weighed a strong federal interest in arbitrations under the Federal Arbitration Act against a state interest it saw "at first blush to present nothing more than a run-of-the-mill contract dispute," and rejected abstention. *Quackenbush* does not suggest any diminution of the Court's concern for comity under *Younger*. The state proceedings did not involve law enforcement on behalf of the state and public. Instead, Quackenbush, the state insurance commissioner, filed the suit in his capacity as trustee for insolvent reinsureds to recover reinsurance proceeds from Allstate. As in *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534 (9th Cir. 1985), the issue was not state policy, or the enforcement of state law, but the meaning of a commercial contract.

the Connecticut judiciary, despite allegations similar to those that the Massachusetts Attorney General has observed involve "the most serious wrongdoing ever alleged in a civil action filed by the Commonwealth."[5]

The Court of Appeals reached this conclusion by misinterpreting the State complaint actually pending in state court. The Court of Appeals isolated only one portion of the relief sought by Connecticut-- reimbursement of its Medicaid costs-- and re-cast an enforcement action in the public interest as a "subrogation action grounded in tort:"

> Although the state pleads its action in state court as an enforcement action pursuant to CUTPA and the state antitrust law to prevent deception and unfair and anticompetitive business practices-- arguably important state interests-- the underlying claim is more accurately classified as a subrogation action grounded in tort. Notwithstanding certain other claims, the primary aim of the state is to obtain reimbursement from the tobacco industry for expenditures caused by its allegedly tortious conduct. This purpose has little to do with eradicating unfair trade practices or anticompetitive business practices.
>
> (A10-11) (citations omitted).[6]

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[5] Memorandum in Opposition to Defendants Motion to Dismiss, at 1, filed in *Commonwealth of Massachusetts v. Philip Morris, Inc. et. al.*, (Middlesex Sup. Ct. CV-95-7378).

[6] The Court of Appeals cited *Philip Morris v. Harshbarger*, 946 F. Supp. 1067 (D. Mass. 1996), where the court reached a similar conclusion, but abstained under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The District Court in the Connecticut action

This decision conflicts with the very foundation of the *Younger* abstention doctrine.

Younger recognizes that under "Our Federalism," principles of comity counsel against permitting a state defendant to interfere with a state judicial proceeding by seeking equitable relief in federal court. If the defendant can vindicate its federal rights in the state proceeding, a duplicative federal action would needlessly disrupt important state interests and "reflect negatively upon the state court's ability to enforce constitutional principles." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

The Court's *Younger* abstention decisions have carefully examined both the procedural state interest-- the integrity of its own judicial process-- and the substantive state interest at stake in that judicial process. Thus, *Younger* abstention recognizes the States' interest in criminal proceedings, *Younger*; proceedings "in aid of and closely related to criminal statutes," *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); the States' judicial contempt process, *Judice v. Vail*, 430 U.S. 327 (1977); and processes for enforcing state judgments, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

Younger abstention also guards against federal

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distinguished *Harshbarger* on the grounds that the Massachusetts complaint did not then contain statutory consumer protection counts. The Massachusetts Attorney General's motion to dismiss the tobacco companies' federal complaint was filed on December 19, 1995, and argued July 30, 1996. Massachusetts did not file its amended complaint containing the consumer protection counts until August 7, 1996. While the *Harshbarger* decision was not issued until November, 1996, the chronology and the decision's reference only to the original December, 1995 complaint, indicate that the District Court in this case correctly stated that the *Harshbarger* decision did not address consumer protection and antitrust claims. In any event, that decision was incorrect for the reasons stated here.

interference with pending state judicial proceedings involving important state interests such as policies to safeguard the fiscal integrity of state welfare programs, *Trainor v. Hernandez*, 431 U.S. 434 (1977); to protect children from child abuse, *Moore v. Sims*, 442 U.S. 415 (1979); or to eliminate sex discrimination, *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

In none of these cases did the Court consider the availability of monetary relief under state law in deciding whether the principles of *Younger* applied to protect important state interests from undue federal interference. Nor did the Court consider whether other specific relief sought might affect the nature of the state interest in its judicial proceeding.[7]

In *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 366 (1989), the Court made clear that such speculation about the "outcomes" of the state judicial proceeding has no place in assessing whether important state interests are implicated in the state proceeding: "When we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case-- which could arguably be off-set by a substantial federal interest in the opposite outcome." Instead, "what we look to is the importance of the generic proceedings to the state."

In this case, the generic proceeding is an enforcement

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[7] "In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills, but rather its interest in 'carrying out the important and necessary task' of enforcing its criminal laws.' Similarly, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), we looked not to Ohio's specific concern with Dayton Christian Schools' firing of Linda Hoskinson, but to its more general interest in preventing employers from engaging in sex discrimination...." *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 365 (1989)(citations omitted).

action under Connecticut's laws regulating commercial practices in the State. Connecticut may seek reimbursement to its Medicaid program, along with other monetary and injunctive relief, as a "particular outcome" of the action. The "generic proceedings," however, determined from the Complaint itself, are proceedings to enforce the State's laws against defendants alleged to have engaged in serious wrongdoing that has harmed the health and welfare of the State's citizens. For *Younger* purposes, the question is not whether the "outcome" will lead to, among other relief, reimbursement of Connecticut's Medicaid fund, but whether the State has an important interest in regulating the conduct of those doing business in the State.

The State of Connecticut's action against the tobacco companies seeks to enforce state law under the Attorney General's common law powers to represent the public interest of the state, as well as under the specific statutory authority, and responsibility, to enforce the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a, *et. seq.* and the Connecticut Antitrust Act, Conn. Gen. Stat. §35-24, *et. seq.* *See, e.g.*, *State of Florida ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-9 (5th Cir. 1976) (Duties and powers of state attorneys general "include all those exercised at common law... he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest."); *State of Tennessee v. Heath*, 806 S.W.2d 535, 537 (1990), *citing* 7 Am.Jur.2d Attorney General §9 (1980); *People ex. rel. Hartigan v. E & E Hauling, Inc.*, 607 N.E.2d 165 (Ill. 1992); *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88-89 (1984) ("the Attorney General is acting in accordance with his broad common law and statutory powers to represent the public interest" and "the Attorney General has a general statutory mandate, in addition to any specific statutory mandate, to

protect the public interest.")

The Attorney General's inclusion of a state agency, such as its Medicaid program, among those harmed by illegal conduct does not alter the sovereign nature of the State's effort to enforce its laws against defendants alleged to have harmed both consumers and state agencies. In cases such as this, the state attorneys general do not simply represent an agency seeking reimbursement, but represent the larger interest of the State and its people. *People ex. rel. Hartigan v. E & E Hauling, Inc.*, 607 N.E.2d 165, 170 (Ill. 1992) (Attorney General had standing under the common law powers to represent "the broader interests of the State..." and "does not purport to represent the [state agency], but rather the People and taxpayers of the State."); *State of Florida ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).

The Court of Appeals's decision, however, deems the Attorney General of Connecticut in this action to be nothing more than a collection attorney for the State's Medicaid fund, and deems the sovereign enforcement of the State's laws as nothing more than a collection action.

If the respect for the States' interest in their judicial proceedings under *Younger* is to have any meaning, a federal court cannot attempt to discern this interest by conducting an inquiry into, or speculating about, the supposed motives of the State's highest law enforcement officer. The only appropriate evidence as to the nature of the state proceeding, and the state interest implicated by that proceeding, is the state law as asserted in the complaint and other pleadings from that proceeding. *Cf. Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99(1987) (under "well-pleaded complaint rule" for removal to federal court, "the plaintiff is the master of the complaint...")

Connecticut's Complaint, to be sure, includes allegations that would support a court award of reimbursement

for the State's increased Medicaid costs due to the conduct of the tobacco companies. The State, however, clearly seeks to protect the health of the state's residents, including children, through enforcement of the Connecticut Unfair Trade Practices Act and the Connecticut Antitrust Act, and the common law of Connecticut. The Complaint's allegations concerning the conduct of the tobacco companies, the harm resulting from that conduct, as well as the nature of relief sought, demonstrate that Connecticut's state court action cannot fairly be described as a "subrogation action."[8]

The State alleges that the tobacco companies conspired to "mislead, deceive, and confuse the State of Connecticut and its residents regarding" the dangers and addictiveness of tobacco use (A24-5); the tobacco companies direct their products at children, who cannot legally purchase them, as a central part of the manufacturers' business strategy (A25-6); the State of Connecticut has a long-standing policy of preventing minors from using tobacco products, and it is a crime in that state to provide minors with tobacco (A26).

The State also alleges harms that implicate traditional, and substantial, state interests in protecting consumers, the health of its residents, and fair business competition. The CUTPA violations limited the ability of consumers to evaluate information about tobacco products and "to obtain safer tobacco products at the lowest possible competitive price," caused adverse health consequences to Connecticut's residents, and facilitated and encouraged the use of tobacco by minors

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[8] Subrogation is the "substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." Black's Law Dictionary, 1427 (6th ed. 1990), *citing Gerken v. Davidson Grocery Co.*, 69 P.2d 122, 126 (1937).

(A116-7); the antitrust violations misled consumers and affected the allocation of resources in the Connecticut economy (A121-122).

Finally, the relief requested in the state proceeding goes well beyond the simple reimbursement of funds to the State, but also includes injunctive relief requiring the defendants to cease the CUTPA violations; to require the disclosure of research and studies concerning the dangers of tobacco; to fund public education campaigns and tobacco cessation programs; to cease the marketing and sales targeting of children. The State also seeks the disgorgement of ill-gotten gains, restitution, punitive damages, and civil penalties. (A127-32).[9]

The State's complaint, therefore, demonstrates that Connecticut's interest in bringing its action against the tobacco companies is to protect its citizens from the serious wrongdoing alleged in the Complaint, enforce state laws regarding unfair, deceptive or anticompetitive business practices, and restore those harmed by unlawful activities. *Cf., California v. Arc America Corp.*, 490 U.S. 93, 101 (1989) ("state common-law and statutory remedies against monopolies and unfair business practices" are among the "historic police powers of the States"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1962) ("...the States have always possessed a legitimate interest in 'the protection of their people

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[9] The tobacco companies claim that they seek only to enjoin the seeking or awarding of monetary relief in the state case (A10). Such a step, however, would profoundly interfere with the on-going state judicial proceeding. A state court could award Connecticut not merely reimbursement of the State's Medicaid expenditures, but restitution and penalties under its consumer protection or antitrust statutes. A federal injunction against such remedies in a state enforcement action, where the tobacco companies are free to raise all federal defenses and rights, would unnecessarily restrain not only the State's enforcement efforts, but also the State judiciary's selection of available remedies.

against fraud and deception in the sale of food products' at retail markets within their borders.") (citation and internal ellipses omitted).

The isolation by the Court of Appeals of only the money damages portion of the relief sought by Connecticut is an irrelevant exercise under *Younger*. "Money damages"--whether in the form of restitution of ascertainable losses, civil or criminal penalties, disgorgement of ill-gotten gains, and reimbursement of the costs of investigation, are an integral part of most state consumer protection or antitrust statutes. *Supra*, n. 1; *People v. Thomas Shelton Powers, M.D., Inc.*, 2 Cal. App. 4th 330; 3 Cal Rptr.2d 34 (1992) ("[T]he laws against unfair business practices were drafted in large part to prevent a wrongdoer from retaining the benefits of its illegal acts.")

The recovery by Connecticut of such damages would serve the same purpose as in most state enforcement actions: to restore victims; punish wrongdoers; and deter other violations of law. If the inclusion of "money damages" among relief sought by the States is a measurement of whether *Younger* applies, there would be, contrary to the jurisprudence of this Court, very few instances of state law enforcement that would implicate a sufficient state interest to justify *Younger* abstention.

In addition, the fact that Connecticut, and most other States and the United States, supplement public enforcement of consumer protection and antitrust laws by authorizing private actions does not diminish the States' interest in their own proceedings to enforce such laws.[10]

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[10] Statutes cited n. 1, *supra*. *See,also, Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968) (petition for certiorari granted and decision below reversed, because erroneous "rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a means for enforcing the antitrust policy of the United States...") *Cf.*,

If anything, "private attorney general" provisions reflect the importance of the state interest by ensuring greater judicial enforcement than would otherwise be possible within the resources of the public enforcement agencies. As the Court of Appeals for the Fifth Circuit observed in *Gresham Park Community Organization v. Howell*, 652 F.2d 1227, 1248 (5th Cir. 1981), "we find unpersuasive any suggestion that Georgia's 'delegation' of the civil suit to a private party implies a lesser state interest: on the contrary, granting private parties who have a strong self-interest in stopping unlawful behavior the right to sue on their own behalf appears to indicate a greater state interest in eliminating behavior elsewhere made criminal."

Moreover, private actions and attorney general actions to enforce the consumer protection laws, while both supporting overall state policy, are not the same. When state attorneys general bring actions to enforce consumer protection or antitrust laws, they do so in the public interest. For example, under the Massachusetts consumer protection statute, private actions may be brought under sections 9 or 11 of General Laws, Chapter 93A, but only the Attorney General may utilize section 4, which requires that the action be brought in the public interest.

The Court of Appeals, therefore, erroneously relied on the States' use of money damages and private remedies to denigrate the substantial interest of the States in preventing and punishing illegal business conduct. The States have a vital interest in protecting their citizens from such conduct, and,

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Fulton v. Hecht, 580 F.2d 1243 (5th Cir. 1978), *rehearing denied*, 585 F.2d 520, *cert. denied*, 440 U.S. 981 (1979) (no implied right of private action under Federal Trade Commission Act, 15 U.S.C. §45); *Baum v. Great Western Cities, Inc.*, 703 F.2d 1197 (10th Cir. 1983) (same); *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981) (same).

under *Younger*, enforcement actions on behalf of this interest must remain free from federal interference.

CONCLUSION

The Commonwealth of Massachusetts and the States named herein respectfully request that the Court grant the Petitioner's Request for a Writ of Certiorari.

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No. 97-1399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD BLUMENTHAL, ATTORNEY GENERAL
OF CONNECTICUT

Petitioner,

—against—

PHILIP MORRIS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Where federal plaintiffs have brought a complaint challenging under the United States Constitution and federal law a state official's threatened attempt retroactively to shift massive costs of the state's own voluntarily-undertaken Medicaid program to them through a radical departure from established principles of law, must the federal court dismiss the federal complaint on *Younger* abstention grounds simply because the state official thereafter brings a state court lawsuit which — in *addition* to the claims for a monetary recovery of medical expenses paid challenged by the federal lawsuit — *also* asserts alleged "enforcement" claims which the State official self-servingly proclaims to be important, and notwithstanding that: (1) the alleged "enforcement" claims in the state lawsuit are conceded by the State official to be "unconnected" with the monetary recovery claims that are being challenged in the federal lawsuit; (2) the federal lawsuit does *not* seek to interfere with any such admittedly "unconnected" enforcement claims; and (3) even as to the purported "enforcement" claims with which the federal lawsuit does not seek to interfere, the state official fails to offer any evidence to support his assertions of importance and there is ample evidence in the record to the contrary?

LIST OF PARTIES

The plaintiffs in this action are Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company. The defendant is Richard Blumenthal, Attorney General of Connecticut.

The following is a list of respondents' parent companies and non-wholly owned subsidiaries, submitted pursuant to Supreme Court Rule 29.6.

Plaintiff-Respondent Philip Morris Incorporated has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

Philip Morris Companies Inc.

Plaintiff-Respondent R.J. Reynolds Tobacco Co. has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

RJR Nabisco Holdings Corp.
RJR Nabisco, Inc.
Nabisco Holdings Corp.

Plaintiff-Respondent Brown & Williamson Tobacco Corp. (including as successor by merger to The American Tobacco Company) has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

B.A.T Industries p.l.c.
Nobleza-Piccardo S.A.I.C. y F. (Argentina)
W.D. & H.O. Wills Holdings Limited (Australia)
British American Tobacco Bangladesh Tobacco Company Limited (Bangladesh)
Polo Industria and Comercia Ltda (Brazil)
Souza Cruz S.A. (Brazil)
B.A.T. Cameroun S.A. (Cameroon)
Imasco Limited (Canada)
Compania Chilena de Tabacos S.A.
Republic Tobacco Co. (Costa Rica)

Skandinavisk Tobakskompagni A/s (Denmark)
Cigarreria Morazan SA de CV (El Salvador)
Pioneer Tobacco Company Limited (Ghana)
Tabacalera Nacional, S.A. (Guatemala)
Demerara Tobacco Company Limited (Guyana)
Tabacalera Hondurena S.A. (Honduras)
BAT Pecsi Dohanygyar Kft (Hungary)
I.T.C. Limited (India)
VST Industries Limited (India)
P.T. BAT Indonesia (Indonesia)
Allied Dunbar International Specialist Funds p.l.c. (Ireland)
B.A.T. Kenya Limited (Kenya)
Threadneedle Global Assets SICAV (Luxembourg)
Malaysian Tobacco Company Berhad (Malaysia)
Tabacalera Nicaraguense SA (Nicaragua)
Nigerian Tobacco Company PLC (Nigeria)
Pakistan Tobacco Company Limited (Pakistan)
British American Tobacco — STF (Russia)
OJSC "British American Tobacco-Yava" (Russia)
Aureol Tobacco Company Limited (Sierra Leone)
British-American Tobacco Company (Singapore) Limited (Singapore)
British American Tobacco Holdings (South Africa) Limited
South African Eagle Insurance Company Limited (South Africa)
Ceylon Tobacco Company Limited (Sri Lanka)
CTC Eagle Insurance Company Limited (Sri Lanka)
British American Tobacco Switzerland S.A.
The West Indian Tobacco Company Limited (Trinidad & Tobago)
B.A.T. Zimbabwe Limited (Zimbabwe)

Plaintiff-Respondent Lorillard Tobacco Company has the following parent companies, subsidiaries, and affiliates that have issued shares to the public:

Loews Corporation, the indirect parent of Lorillard Tobacco Company.

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JURISDICTION

Petitioner asserts that he has "invoke[d] the jurisdiction of this Court under 28 U.S.C. § 1281(1)." Petition at 2. No such federal statute exists. It would appear, however, that 28 U.S.C. § 1254(1) would be applicable, albeit Petitioner does not cite to that statute. In any event, as shown in this brief, there is no reason for this Court to exercise jurisdiction in this case.

STATEMENT OF THE CASE

Although the Connecticut Attorney General barely mentions it and fails even to include it in his appendix, the complaint that is at issue in this action — which the Second Circuit upheld against a *Younger* abstention challenge — is the *federal* complaint filed by the plaintiff tobacco companies (the "Companies") against the Connecticut Attorney General. That complaint (the "Federal Complaint"):

- alleges that the Attorney General was threatening to bring a lawsuit (the "Threatened Lawsuit") "*seeking hundreds of millions of dollars from plaintiffs . . . to pay for Medicaid payments* that Connecticut voluntarily undertook to make to its Medicaid-eligible residents, wholly irrespective of whether plaintiffs would have any liability under established principles of law to pay for the medical care of any actual Medicaid recipient." RA 3 (at ¶ 9, emphasis added);
- alleges that "[t]he Threatened Lawsuit violates basic principles of constitutional law . . . [by] seek[ing] to impose upon plaintiffs . . . *massive costs of the Medicaid program that Connecticut has voluntarily chosen to establish, irrespective of traditional principles of law* governing the rights and duties of plaintiffs with respect to any actual Medicaid recipient." RA 6 (at ¶ 16, emphasis added); and
- seeks declaratory and permanent injunctive relief against the Attorney General "from prosecuting,

imposing or enforcing *liability*" pursuant to that Threatened Lawsuit. RA 27-28 (prayers for relief, emphasis added). *See also, e.g.*, RA 4-5 (¶ 12), RA 6 (¶ 17), RA 9-15 (¶¶ 25-41).[1]

As the Second Circuit recognized, for months preceding the filing of the Complaint, the Attorney General had been threatening to file a lawsuit against the Companies, seeking to hold them liable for hundreds of millions of dollars in health care payments voluntarily expended by Connecticut. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 104 (2d Cir. 1997); *see* RA 3-6, 15-17 (Complaint ¶¶ 9-15, 41-47). Thus, "[i]n 1995, the Attorney General attempted to obtain legislative authorization for a lawsuit against the tobacco companies." 123 F.3d at 104. A bill that would have provided that desired authorization was introduced (1995 House Bill 6991), and the Attorney General himself appeared and gave testimony before the Judiciary Committee of the Connecticut General Assembly in support of it. JA266-75. But "[t]he Connecticut General Assembly declined to enact legislation authorizing such a suit." 123 F.3d at 104.

Once again, in March 1996, the Attorney General made an appearance before the General Assembly to give testimony in support of another bill that would have authorized him to file his threatened lawsuit against the tobacco companies (1996 House Bill 5817). 123 F.3d at 104; *see* RA 3-4 (Complaint ¶ 10); JA276-302. But once again, notwithstanding the Attorney General's personal appearance and support, the General Assembly denied authorization. 123 F.3d at 104; *see* RA 4, 15 (Complaint ¶¶ 11, 40).

"Notwithstanding the General Assembly's denial of authorization, the Attorney General made clear through the press that he intended to proceed with the legal action." 123 F.3d at 104. *See also* RA 16-17 (Complaint ¶¶ 43-46). As detailed in the

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[1] The Companies' Federal Complaint is attached hereto as Respondents' Appendix. Citations to Respondents' Appendix are labeled "RA"; citations to Petitioner's Appendix are labeled "PA"; and citations to the Joint Appendix that was before the Second Circuit are labeled "JA."

Companies' Federal Complaint, the press reported in the ensuing weeks and months following the failure of the proposed bills that, despite these legislative rejections, the Attorney General: "could file a lawsuit against the major tobacco companies within several weeks, seeking millions in repayment for Medicaid and Medicare expenses for tobacco-related illnesses"; that the lawsuit would seek "to recover for Connecticut taxpayers" health-care costs attributed to smoking, which defendant estimated as "$900 million"; that the Attorney General had "filed notices with newspapers across the state . . . seeking proposals for law firms to work with his office on the suit" on a contingency fee basis; and that the Attorney General "hope[d] to file the suit by late spring or early summer." RA 16-17 (Complaint ¶¶ 43-46).

The theory of the Attorney General's threatened lawsuit — without any precedent under Connecticut law — was that the Companies should bear Connecticut's health care costs allegedly associated with smoking: (1) without regard to whether the Companies would be liable, for health care costs or otherwise, to any individual smoker or other person (RA 3-5, 19 (Complaint ¶¶ 10, 12, 55)); (2) notwithstanding that both federal and Connecticut law expressly sanction tobacco products as a legal article of commerce, and that Connecticut has for many years taxed and itself sold cigarettes, garnering millions of dollars by doing so (RA 6-8 (Complaint ¶¶ 18-20); JA200-47); and (3) notwithstanding that the Attorney General was not purporting to sue the manufacturers of any other product on this basis, but rather was selectively asserting this extraordinary theory of liability against a certain disfavored industry (RA 2, 3, 18, 20 (Complaint ¶¶ 2, 9, 51, 59)). This massive and unprecedented liability, moreover, was to be imposed on both a retroactive and prospective basis. RA 3, 20 (Complaint ¶¶ 9, 59).

In his pre-suit press statements, the Attorney General presented his threatened lawsuit as one *seeking to recover money* purportedly for health care payments made by the State of Connecticut, arguing that Connecticut taxpayers should support his

lawsuit because it may produce a huge monetary recovery for their own benefit:

- March 19, 1996 press release: "Our goal is *simply to recover money* that taxpayers have paid for the health care costs of tobacco-related illnesses." JA260 (emphasis added).
- May 1, 1996 press release: "We are preparing to file a lawsuit that will demand *repayment for state expenses for tobacco-related illnesses*"; "the tobacco industry is responsible for *hundreds of millions of dollars in state expenses* . . . and we believe this lawsuit will succeed in bringing *millions of dollars back to taxpayers*." JA262 (emphasis added).
- July 1, 1996 press release: "Connecticut Attorney General Richard Blumenthal today blasted an attempt to block *Connecticut's effort to recoup hundreds of millions of taxpayer dollars spent on tobacco-related diseases*;" the Federal Complaint was an effort to "hamper our efforts *to recover money* rightly due the state of Connecticut." JA264 (emphasis added).

None of these pre-suit press releases so much as mentioned any non-monetary relief.[2]

As set forth in the Companies' Federal Complaint, the Attorney General's threatened lawsuit called into question the Companies' legal rights with respect to past, present, and future

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[2] Thus, the Attorney General has things exactly backwards when he suggests that the Companies somehow "pars[ed] the State's claims for relief and challenge[d] a portion of them . . . to avoid *Younger* abstention." (Petition at 17 n.6) The Companies filed their Federal Complaint first, and the Companies' Federal Complaint challenged the claims that the Attorney General had publicly threatened to bring: monetary claims seeking recovery of medical expenses paid. It was the Attorney General's complaint — obviously styled by his contingency fee counsel with an eye to buttressing his plea for *Younger* abstention — that for the first time interjected other claims in addition to the monetary claims seeking recovery of medical expenses paid challenged by the Federal Complaint.

sales of their products in Connecticut and necessarily affected their businesses on a going-forward basis. RA 17-18 (Complaint ¶48). Accordingly, as the Second Circuit observed, on June 28, 1996, the Companies brought this action in federal court seeking to vindicate their rights under the federal constitution and federal statutes with respect to " '[t]he [t]hreatened . . . impos[ition] upon [the Companies] on a retroactive basis massive costs of the Medicaid program that Connecticut has voluntarily chosen to establish, irrespective of traditional principles of law governing the rights and duties of [the Companies] with respect to any actual Medicaid recipient,' " and to "resolve questions about the consequences of their continuing to do business in Connecticut." 123 F.3d at 104 (quoting Federal Complaint); *see* RA 6, 17-18 (Complaint ¶¶ 16, 48).[3]

Three weeks after the Companies filed their Complaint, on July 18, 1996, the Attorney General carried through on his threats, filing a lawsuit in state court seeking (*inter alia*) an "award[ ] [of] actual damages and compensation to the State of Connecticut for past and future damages, including but not limited to health care expenditures." PA 127-132 (State Complaint Prayer for Relief, ¶¶ A, C-G). The Attorney General's state court complaint seeks to impose the massive retroactive and prospective health care cost liability which the Companies had previously challenged on federal constitutional grounds in this federal action.

In addition, the Attorney General added to his state court complaint purported "enforcement" claims seeking injunctive and other relief, claims which the Companies' federal action had *not* addressed. As the Attorney General conceded in his brief to the Second Circuit below, these aspects of his lawsuit which he claimed to be "sovereign [in] nature" are "*unconnected* with the State's . . . claim for recovery of its Medicaid payments" — *i.e.*, the only claim challenged by the federal lawsuit. Atty. Gen. 2d Cir. brief at 25-26. *See also* Petition at

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[3] The Companies' federal Constitutional claims are asserted, *inter alia*, under both 42 U.S.C. § 1983 and the federal Declaratory Judgments Act, 28 U.S.C. § 2201 *et seq.* *See* RA 1-2, 17-29.

14-15 ("The State's legal claims . . . *are independent of one another* and do not rise or fall together.") (emphasis added).

Despite the inclusion of certain non-monetary claims in his state court suit, the Attorney General's statements at his press conference held the day his suit was filed made clear that his "primary purpose" in bringing the suit was to seek to obtain a massive monetary recovery from the Companies, stating that the suit was "unprecedented, not only *in the amount of money* it is seeking to recover, but in the level of public interest *in winning damages* from the tobacco companies." JA253-54, JA257 (emphasis added). A news article reporting on that press conference stated that the suit sought $1 billion in damages and was "the largest civil lawsuit ever brought by the state of Connecticut." JA253.

Four days after filing his lawsuit in state court, the Attorney General moved to dismiss the Companies' Federal Complaint in this action, arguing that — by virtue of his having thereafter filed the threatened lawsuit in state court — the District Court was thereupon required to dismiss the Companies' Federal Complaint under the *Younger* abstention doctrine.

While the Petition asserts that the Companies "took [no] action in federal court thereafter to pursue their claims" (Petition at 3), the only reason why the Companies' federal lawsuit has not progressed beyond the complaint stage is that there has been no answer and, but three weeks after the Companies filed their Complaint, the Attorney General moved to dismiss it on *Younger* abstention grounds. Until the Attorney General's motion was resolved, the Companies could not proceed to move for summary judgment on their preemption claims (which the Companies had planned to do). Accordingly, the fact that the Companies' lawsuit has not progressed beyond the complaint stage is not due to some litigation strategy of the Companies, but rather is due to the litigation strategy of the Attorney General.[4]

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[4] Even if it were somehow applicable (and the Second Circuit held that it is *not*), *Younger* abstention could have been waived by the State. *See Morales* v. *Trans World Airlines*, 504 U.S. 374, 381 n.1 (1992).

(footnote continued)

On December 23, 1996, the District Court (without oral argument or a hearing) dismissed the Companies' Complaint on *Younger* abstention grounds. PA 14-23. The District Court's decision was contrary to the decision just one month earlier in *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067 (D. Mass. 1996), which held that *Younger* abstention was *not* applicable to the substantially identical federal lawsuit filed by the Companies against the Attorney General of Massachusetts.

The Companies appealed the Connecticut District Court's decision to the United States Court of Appeals for the Second Circuit, which unanimously reversed. *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d 103 (2d Cir. 1997). The Second Circuit began its analysis by noting the limited scope of the Companies' Federal Complaint:

> The Tobacco Companies challenged on constitutional grounds *aspects* of the relief that the state intended to pursue. In particular, they challenged *the recovery of Medicaid payments made by Connecticut* in connection with illnesses that allegedly are tobacco-related, and they sought to resolve questions about the consequences of their continuing to do business in Connecticut during the pendency of the threatened suit.
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> * * *
>
> In the instant case, the Tobacco Companies seek a federal court injunction prohibiting the state *from collecting from them monies expended by the state* for treatment of smoking-related illnesses. (*Id.* at 104-06 (emphasis added).)

Thus, the Attorney General could have chosen to litigate the Companies' constitutional claims on their merits in the federal courts. Plainly, the Attorney General hopes to avoid federal court scrutiny of his threatened imposition upon the Companies of Connecticut's health care costs.

Similarly, while the Attorney General seeks to buttress his *Younger* abstention argument by observing that the Companies did not seek a preliminary injunction in their lawsuit (Petition at 3), it is difficult to see how the fact that the Companies sought *less* interference with the state proceedings can somehow render *Younger more* applicable, and the Attorney General cites no authorities in support of such an illogical proposition.

While the Attorney General argued below (and assumes in his Petition) that the Companies' Federal Complaint should instead be construed as seeking more "sweeping" relief (*see* Petition at 17 n.6), the Second Circuit held that "read in context" the Complaint could not be so broadly construed. 123 F.3d at 106 n.2.

Having properly started by determining the scope of the Companies' Federal Complaint, the Second Circuit went on to "consider the underlying nature of the state proceeding *on which the federal lawsuit would impinge*." *Id.* at 106 (emphasis added). The Court concluded that "the *federal action* [does not] implicate[ ] an important state interest within the meaning of *Younger*," *id.* at 105-06 (emphasis added), applying the "generic proceeding" test set forth in *New Orleans Pub. Serv., Inc.* v. *Council of New Orleans*, 491 U.S. 350, 365 (1989) ("NOPSI"). In so holding, the Court examined the generic nature of only those aspects of the state lawsuit with which the Federal Complaint would interfere, and concluded that such claims are "more accurately classified as a subrogation action grounded in tort," which "is not a generic proceeding of great importance to the state." 123 F.3d at 106.

Accordingly, the Second Circuit unanimously held that *Younger* abstention did not apply, reversed the District Court's decision and remanded the action to the District Court. The Second Circuit added that "[u]pon remand, the district court, in its discretion, may consider whether abstention is appropriate under the *Pullman* doctrine." *Id.* at 107.

The Attorney General filed a petition before the Second Circuit seeking panel rehearing or rehearing en banc, but that petition was denied with no judge of the Second Circuit having voted for panel rehearing or en banc review.[5]

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[5] At the request of the Attorney General, the Second Circuit stayed issuance of its mandate pending resolution by this Court of the Attorney General's Petition for Certiorari. Accordingly, no further proceedings in the District Court have yet taken place, and the District Court has yet to consider whether *Pullman* abstention might be applicable to some or all of plaintiffs' claims.

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present the Questions that Petitioner Contends It Presents

This case does not merit certiorari review for several reasons. First, and most fundamentally, this case simply does not present the questions that Petitioner contends it presents.

According to Petitioner, this case raises various issues concerning the extent to which a federal court can recharacterize or reject the basis of a State's state court pleading in determining whether *Younger* abstention applies. However, the Petition misapprehends and mischaracterizes the decision by the Second Circuit. The Second Circuit did *not*, as Petitioner asserts in his Questions Presented, "disregard," "recharacterize," or "reject the basis of" the State's complaint (*see* Petition, Questions Presented Nos. 1-4). Rather, what the Second Circuit did was to analyze the scope of the *Companies' Federal Complaint*, and to determine whether the aspects of the State lawsuit with which the Federal Complaint would interfere — namely, the State's attempt to obtain a monetary recovery in favor of itself of medical expenses paid — implicated an important state interest for *Younger* purposes.

Petitioner's *mis*understanding of the Second Circuit's decision is illustrated at page 11 of the Petition, where Petitioner assumes the Second Circuit's decision contains a typographical error when the Second Circuit states: "we do not find that the *federal* [sic] action implicates an important state interest within the meaning of *Younger*." Petition at 11 (emphasis added) (quoting 123 F.3d at 105). The word "federal" in that quote is not a typographical error: rather, it reflects the Second Circuit's assessment that the scope of the *Companies' Federal Complaint* was limited to enjoining the State from imposing monetary liability upon the Companies in favor of itself on account of medical expenses paid. The Second Circuit did *not* "disregard," "recharacterize" or "reject" the other aspects of the State's lawsuit; rather, it simply analyzed the Companies' Federal Complaint, and correctly observed that it does not

interfere with the nonmonetary alleged "enforcement" aspects of the State's lawsuit. 123 F.3d at 105-06 & n.2.[6]

While Petitioner contends in a footnote that the Second Circuit's interpretation of the scope of the Companies' Federal Complaint is wrong (Petition at 17, n.6), and that the Companies' Complaint should instead be construed as being "much more sweeping," the Petitioner has not asked this Court to review the Second Circuit's interpretation of the Companies' Federal Complaint, and the interpretation by the Second Circuit of the Companies' Federal Complaint hardly warrants certiorari review by this Court. *See Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 106 n.2 (2d Cir. 1997).

Accordingly, this case simply does not present the issues Petitioner contends it presents, and therefore this case is an inappropriate vehicle to consider such questions.

B. Petitioner Has Failed to Show that the Court of Appeals Rendered a Decision in Conflict with Any Decision of this Court or Other Court of Appeals

1. No Conflict with Any Decision of Other Court of Appeals

Petitioner does not contend — nor could he — that the decision of the Second Circuit is in conflict with any decision by any other Court of Appeals. Quite to the contrary, by focusing on the scope of the Companies' Federal Complaint, and seeking to determine whether the Federal Complaint would interfere with important state interests, the Second Circuit's

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[6] Notably, in his Petition for Panel Rehearing or Rehearing en banc submitted to the Second Circuit, the Attorney General did *not* contend that the word "federal" in the passage of the Second Circuit opinion quoted in the Petition (at 11) reflected a typographical error. Petition for Rehearing p. 5 (quoting same language but *without* noting or arguing that this language contained typographical error). If the Attorney General believed that the Second Circuit's opinion contained a typographical error, it was incumbent upon him to raise that in his Petition for Rehearing. The Attorney General's failure to do so only highlights the presumptuousness of his incorrect assumption that the use of the word "federal" by the Second Circuit was a typographical error.

decision is consistent with the decisions of the other Circuits. *See Gwynedd Properties, Inc.* v. *Lower Gwynedd Township*, 970 F.2d 1195, 1202-03 (3d Cir. 1992) ("the second prong of the *Younger* test has not been met as the *federal action does not interfere* with state proceedings implicating important state interests") (emphasis added); *AFSCME* v. *Tristano*, 898 F.2d 1302, 1305 (7th Cir. 1990) (same); *Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989) (same); *International Longshoremen's Ass'n* v. *The Waterfront Commission of New York Harbor*, 495 F. Supp. 1101, 1111 (S.D.N.Y. 1980) (same), *aff'd in part and rev'd in part on other grounds*, 642 F.2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981); *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1076-78 (D. Mass. 1996) (same).[7]

These decisions in turn reflect this Court's teaching that the fundamental touchstone of *Younger* abstention is the avoidance of *federal court interference* with vital state interests. *See Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 434-35 & n.12 (1982) ("the salient fact" for *Younger* abstention "is whether federal-court interference would unduly *interfere*" with important state interest; state must have important interest "in the pending state judicial proceedings *and in the federal case*") (emphasis added); *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1721 (1996) (under *Younger*, "federal courts have the power to refrain from hearing cases that would *interfere* with a pending state criminal proceeding or with certain types of state civil proceedings") (emphasis added). Since *Younger* abstention by definition thus cannot be predicated upon aspects of the Attorney General's state lawsuit with which the Federal Complaint would not interfere, the Second Circuit

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[7] Recently, a District Court in Alaska — albeit acknowledging that all other decisions had reached a contrary conclusion — applied *Younger* abstention to a complaint filed by the tobacco companies against the Alaska Attorney General. *Philip Morris, Inc.* v. *Botelho*, No. A97-0003-CV (HRH) (D. Alaska Apr. 15, 1998). The Companies have appealed that decision to the Ninth Circuit. Should the Ninth Circuit affirm the District of Alaska's decision, there may then be a division among the Circuits that could warrant review by this Court. Such a division among the Circuits, however, has not developed.

properly focused on those aspects of the state proceeding with which the Federal Complaint does seek to interfere — *i.e.*, claims seeking monetary recovery for medical expenses paid.[8]

Petitioner also contends that the Second Circuit "reject[ed] the basis of" his Complaint, because the common law Medicaid recovery claims asserted by the State are not subrogation claims, but rather purport to "seek damages for direct harm to the State caused by the tobacco companies' conduct." Petition at 13. However, contrary to Petitioner's assertion, the Second Circuit did *not* "decide state law questions" (Petition at 11, 14) or rule that the State's Medicaid recovery claims *were* subrogation claims, but rather ruled that the *generic nature* of such claims "is more accurately *classified* as a subrogation action grounded in tort." *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 106 (emphasis added). The Second Circuit elaborated: "This action, *like* a subrogation action, primarily concerns the apportionment of loss based upon theories of tort liability — who should be responsible for paying for the injuries suffered by those who contracted tobacco-related illnesses." 123 F.3d at 107 (emphasis added). Accordingly, the Second Circuit concluded, *Younger* abstention did not apply.[9]

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[8] Thus, the Attorney General's argument that *Younger* abstention is warranted because his state court complaint seeks certain non-monetary relief that is similar to various elements of the national Proposed Resolution dated June 20, 1997 signed by the Companies and certain attorneys general (including Petitioner) is without merit. The Attorney General's argument ignores that, as the Second Circuit found, the Companies' Federal Complaint simply does not seek to interfere with any such non-monetary claims. In any event, the fact that the State's lawsuit covers an area in which the federal government has extensively regulated (*i.e.*, the advertising and promotion of cigarettes, *see, e.g.*, 15 U.S.C. § 1331 et seq.) militates against, rather than in favor of, *Younger* abstention. *See Ayers* v. *Philadelphia Housing Authority*, 908 F.2d 1184, 1186, 1195 n.21 (3d Cir. 1990) (*Younger in*applicable to federal action challenging housing authority's state court eviction proceeding which related to housing program subject to "detailed federal regulation"; "whatever the state's interest may be in regulating proceedings which result in removal of citizens from their homes, it cannot supersede the relevant federal interests in governing the expenditure of federal funds for . . . HUD housing programs.").

[9] In his principal Second Circuit brief and again in his petition seeking panel rehearing or rehearing en banc, the Attorney General repeat-

In so holding, the Second Circuit came to the same conclusion as did the District of Massachusetts with respect to the virtually identical federal complaint filed by the tobacco companies against the Massachusetts Attorney General. The Massachusetts District Court likewise held that the generic nature of Massachusetts' claims against the tobacco companies seeking monetary recovery for medical expenses paid did not implicate important state interests, reasoning that:

> Under both federal and state statutes, Massachusetts is required to pursue liable third parties for amounts paid on behalf of Medicaid beneficiaries. In suing the cigarette manufacturers for the cost of treating diseases caused by smoking, Massachusetts is seeking a remedy that is *classically in the nature of subrogation*. (*Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1077 (D. Mass. 1996) (emphasis added).)[10]

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edly pointed out that his state court complaint does not plead subrogation claims, but rather "seeks damages for *direct harm* to the State *caused by the tobacco companies' conduct*." Atty. Gen. Pet. Reh'g at 7 (emphasis in original); *see also, e.g.*, Atty. Gen. 2d Cir. brief at 30 ("Connecticut's state court action is not based . . . on any . . . right of subrogation"). Accordingly, the Attorney General's argument that the Second Circuit was under a "misunderstanding" as to his claims (*e.g.*, Petition at 15) — apart from being totally belied by the language of the Second Circuit's decision — is totally fallacious.

[10] Petitioner's attempt to distinguish *Harshbarger* from the case at bar (Petition at 14, n.5), echoed in the Amicus brief (at pp. 6-7, n.6), is without merit. In the first place, Petitioner incorrectly asserts that the Massachusetts District Court described the Massachusetts action "as merely 'a suit for money damages.' " Petition at 14, n.5. Quite to the contrary, the Massachusetts District Court expressly recognized that the Massachusetts Complaint sought "both monetary damages *and injunctive relief*." *Massachusetts* v. *Philip Morris, Inc.*, 942 F. Supp. 690, 692 (D. Mass. 1996) (emphasis added). And in the oral argument before the Massachusetts District Court, counsel for the Massachusetts Attorney General emphasized that Massachusetts was not only seeking a monetary recovery for medical expenses paid, but was also seeking "four types of injunctive relief" (the same types of injunctive relief that Connecticut seeks) and was purporting to protect the "vital interest in the health and safety of Massachusetts consumers." JA667-68.

Moreover, just one week after oral argument on the Massachusetts *Younger* abstention motion (and over three months before the Massa-

Accord City and County of San Francisco v. *Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) (Court, in upholding the retention of contingency fee counsel by the City and County of San Francisco in its health care cost recovery suit against the Companies, stated that "[p]laintiffs' role in this suit is that of a tort victim, rather than a sovereign.")

2. No Conflict with Any Decision of this Court

Likewise, the Second Circuit's decision does not conflict in any way with the decisions of this Court. Petitioner's contention that the Second Circuit only "pa[id] lip service" (Petition at 12) to the "generic proceedings" standard set forth by this Court in *NOPSI* v. *Council of New Orleans*, 491 U.S. 350, 365 (1989), is totally unsupported and is belied by the Second Circuit's decision. As this Court stated in *NOPSI*, "when we inquire into the substantiality of the State's interest . . . we do not look narrowly to its interest in the outcome of the particular case . . . . In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills." 491 U.S. at 365.

It is clear that the Second Circuit followed the "generic proceedings" standard set forth in *NOPSI*. *See* 123 F.3d at 106. As the Second Circuit stated: " '[W]e do not look narrowly to [the State's] interest in the outcome of the particular case', but rather look to 'the importance of the generic proceedings to the

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chusetts District Court's decision), Massachusetts amended its complaint to add its Consumer Protection Act claim. If the simple mechanism of adding a Consumer Protection Act claim were even arguably the "magic bullet" of *Younger* abstention that the Attorney General here claims (and that the Massachusetts Attorney General claims in his Amicus brief), one might have expected the Massachusetts Attorney General to have submitted his amended complaint to the Massachusetts District Court in the three months that passed after his amendment of his complaint until the District Court rendered its decision. Yet he did not do so.

Finally, and even more fundamentally, the Attorney General's attempt to distinguish *Harshbarger* totally ignores that the *federal* complaints filed by the Companies in Massachusetts and Connecticut are substantially the same and, as the Second Circuit recognized, seek only to interfere with claims for a monetary recovery of medical expenses paid.

State'. . . . In order to ascertain the 'generic proceeding' involved . . . [w]e must consider the underlying nature of the state proceeding on which the federal lawsuit would impinge." *Id.* (citing *NOPSI*, 491 U.S. at 365.). Thus, the Second Circuit looked not to the fact that the State's claims are asserted against tobacco companies, but rather looked to the generic nature of the claims with which the federal complaint would interfere — claims seeking a monetary recovery of medical expenses paid — and properly determined that such claims do not implicate important state interests, but rather "primarily concern[ ] the apportionment of loss based upon theories of tort liability — who should be responsible for paying for the injuries suffered by those who contracted tobacco-related illnesses." *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 107. *Accord Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1077 (D. Mass. 1996) ("The question is whether [the] interest [in] recouping from liable third parties money paid to Medicaid beneficiaries . . . is within the zone of 'vital state interests' to which the *Younger* doctrine gives its special recognition").

In concluding that monetary claims seeking recovery of medical expenses paid do not implicate important state interests, the Second Circuit was unquestionably correct. Many private parties have also brought claims for recovery of medical expenses paid — insurance companies, health care funds, and others. Claims to recover medical expenses paid do not become transformed into claims which implicate important state interests so as to warrant invocation of *Younger* abstention and abdication of federal jurisdiction over federal claims simply because the State is the plaintiff suing to recover money for itself. As the Second Circuit noted:

> The monetary relief sought by the state also would be available to a private citizen. Connecticut General Statutes § 42-110g provides that any private party may seek to recover actual damages suffered as a result of alleged CUTPA violations (as the state seeks to do in the instant action) and, in its discretion, the court may also award the private party punitive damages and equitable relief. Sim-

> ilarly, while the state is empowered under Connecticut General Statutes § 35-32 to bring actions in the name of the state or as parens patriae for violations of the state antitrust laws, and is entitled to recover treble damages, Connecticut General Statutes § 35-35 also entitles private parties to recover treble damages on their own behalf for antitrust violations. Thus, on its face, the state action does not appear to differ greatly from a private action under CUTPA, and the mere fact that the state is involved as a party does not transform the action into a "sovereign enforcement" proceeding. (123 F.3d at 106-07.)

Accord, e.g., *Cate* v. *Oldham*, 707 F.2d 1176, 1183 (11th Cir. 1983) ("Application of the *Younger* doctrine to ongoing state civil proceedings has been limited to those civil actions in aid of criminal jurisdiction or involving enforcement-type proceedings in which vital interests of the state qua state are involved"; *Younger* abstention did not apply because "[t]he state and the state official as plaintiffs in the [state court] action serve no function different from that of private plaintiffs"); *Mobil Oil Corp.* v. *City of Long Beach*, 772 F.2d 534, 542 (9th Cir. 1985) (*Younger* abstention inapplicable because "[t]he only state interest . . . assert[ed] is [a] claim for money damages, which is clearly insufficient to support dismissal"); *see also Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1727 (1996) (refusing to abstain under *Burford* in favor of damages lawsuit state official had brought in state court, pronouncing the "state['s] interests" in "seeking damages" to be "run-of-the-mill" rather than important).

Nor is the Second Circuit's unanimous decision in any way inconsistent with this Court's decision in *Trainor* v. *Hernandez*, 431 U.S. 434 (1977). In *Trainor*, this Court applied *Younger* abstention in favor of a state civil enforcement action and resulting attachment proceeding against a person who had committed fraud on the state authorities by making false and fraudulent statements in a welfare application. *See id.* at 436-38. *Trainor* does not remotely, as the Attorney General contends, mandate *Younger* abstention when a state is seeking to recover money for one of its "public assistance" programs.

As the Second Circuit recognized, this Court's rationale for invoking *Younger* abstention in the *Trainor* case was that the state was seeking " 'to safeguard[ ] the fiscal integrity of [its public assistance] programs' " against a person who had "fraudulently concealed assets when applying for welfare benefits." *Philip Morris, Inc.* v. *Blumenthal*, 123 F.3d at 107 (*quoting Trainor*, 431 U.S. at 444). Moreover, as the Second Circuit also recognized, this Court relied heavily upon the fact that "the State might have elected to pursue . . . a criminal prosecution" in *Trainor*, 123 F.3d at 107 (citing *Trainor*, 431 U.S. at 443-44 (plurality opinion)), and that for Justice Blackmun, who cast the crucial fifth vote breaking a 4-4 tie, the fact that "the State had the option of proceeding either civilly or criminally" under the circumstances was critical. *Trainor*, 431 U.S. at 449 (Blackmun, J., concurring).[11]

As the Second Circuit thus correctly reasoned in distinguishing *Trainor*:

> The instant case does not involve a threat to the "fiscal integrity" of Connecticut's Medicaid program because no fraud has been committed against that program. There is no suggestion that any individual who received Medicaid benefits in relation to a tobacco-related illness was not entitled to those benefits. The mere fact that conduct results in expense to a state program is not enough to bring an action to terminate that conduct within the scope of *Trainor*. Nor can every initiative by a state to improve fiscal soundness by getting money be deemed a safeguard of "fiscal integrity." (123 F.3d at 107.)

The District of Massachusetts reached the same conclusion in the *Harshbarger* case:

> The Court's language in *Trainor* indicates that it did not mean to extend *Younger* to cover every kind of state suit to recover money paid out under public assistance programs. Both the opinion of the Court, subscribed by four

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[11] Here, of course, no criminal statute is even claimed to authorize the Attorney General's claims for monetary (or any other) relief.

> Justices, and Justice Blackmun's concurrence emphasized that Illinois was pursuing through civil means interests it might have chosen to vindicate through a criminal prosecution. *Trainor*, 431 U.S. at 444, 449-50 (Blackmun, J., concurring). In the Court's view, Illinois was acting in its traditional sovereign role to protect its programs against fraudulent claims. (946 F. Supp. at 1077).

Thus, the Second Circuit's decision is not remotely inconsistent with this Court's decision in *Trainor*.

Nor is the argument presented in the Amicus Curiae brief filed by the State of Massachusetts (on behalf of itself and other states) that the Second Circuit's decision is inconsistent with decisions of this Court persuasive. The Amicus brief asserts that "[t]his Court has never held that where a State brought a judicial proceeding, the state interest was of insufficient magnitude to justify *Younger* abstention." Amicus Brief at 5. However, this Court has *repeatedly* rejected the notion "that every pending proceeding between a State and a federal plaintiff" warrants *Younger* abstention, holding that in civil cases this is not even "remotely" the case. *NOPSI*, 491 U.S. at 368; *Moore* v. *Sims*, 442 U.S. 415, 423 n.8 (1979).

As the District of Massachusetts recognized in rejecting a *Younger* abstention argument with respect to a substantially identical federal complaint filed by the tobacco companies against the Massachusetts Attorney General, the position urged by the Massachusetts Attorney General is contrary to this Court's repeated admonitions that *Younger* abstention applies "only [in] exceptional circumstances," and "remains the exception, not the rule." *NOPSI*, 491 U.S. at 359, 368. *See also Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976); *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1720-21 (1996). As the Massachusetts District Court aptly put it: "To apply the *Younger* doctrine and abstain in the present case would go a long way toward reversing that relationship and making abstention the rule, not the exception." *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1078 (D. Mass. 1996).

Moreover, it is noteworthy that while the Massachusetts Attorney General has submitted an Amicus Curiae brief in this case urging Supreme Court review of the *Younger* abstention issue, he did *not* take any steps to appeal to the First Circuit (by seeking certification or otherwise) the District of Massachusetts' similar decision rejecting *Younger* abstention. The Massachusetts Attorney General's argument that the *Younger* abstention issue merits certiorari review by this Court rings hollow in light of his failure even to seek First Circuit review of the similar decision against him rendered by the Massachusetts District Court.[12]

More generally, the Amicus brief suffers from many of the same infirmities as does the Petition. Thus, like the Petition, the Amicus brief mischaracterizes the Second Circuit's decision, trumpets aspects of the state lawsuit with which the federal complaint would *not* interfere, and fails to come to grips with the Second Circuit's determination that the scope of the Companies' Federal Complaint is limited to the State's attempt to obtain a monetary recovery in favor of itself for medical expenses paid. *See*, *e.g.*, Amicus Brief at 4 ("The Court of Appeal's [sic] re-casting of the State's case . . ."); *id.* at 12 ("the relief requested in the state proceeding goes well beyond the simple reimbursement of funds to the State, but also includes injunctive relief"); *id.* at 6 ("The Court of Appeals . . . misinterpret[ed] the State complaint," which did not assert "subrogation claims").

* * *

Accordingly, since the Second Circuit's decision is not in conflict with any decision of this Court or other Court of Appeals, certiorari review is not warranted.

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[12] The incongruity in the Massachusetts Attorney General's positions cannot be explained by the fact that, as discussed in Section C below, the Massachusetts District Court applied *Pullman* abstention to stay the Companies' federal lawsuit. Here, the Second Circuit has likewise expressly instructed that "[u]pon remand, the district court, in its discretion, may consider whether abstention is appropriate under the *Pullman* doctrine." 123 F.3d 107.

C. This Case Would in Any Event Be an Inappropriate Vehicle for Review of Any Issues Petitioner Contends It Presents Because the Second Circuit Has Remanded for Consideration of Pullman Abstention

The Petition fails to mention that the Second Circuit remanded to the District Court with the instruction that "[u]pon remand, the district court, in its discretion, may consider whether abstention is appropriate under the *Pullman* doctrine." 123 F.3d 107. Thus, it is possible that, upon remand, the District Court will nevertheless determine to abstain as to some or all of plaintiffs' federal claims under the *Pullman* abstention doctrine. In the similar case filed by the Companies against the Massachusetts Attorney General, the Massachusetts District Court determined that *Pullman* abstention was applicable to all of the Companies' claims. *Philip Morris, Inc.* v. *Harshbarger*, 946 F. Supp. 1067, 1078-79 (D. Mass. 1996).

Accordingly, inasmuch as the District Court has yet to consider whether abstention may nonetheless be appropriate under the *Pullman* doctrine, the procedural posture of this case in any event makes it inappropriate for review of the Second Circuit's determination that *Younger* abstention did not apply.

D. The Petition Mischaracterizes the Record Below

Finally, the Petition significantly mischaracterizes the record below. Thus, Petitioner asserts that "[t]he only evidence of record" in the courts below as to whether the Companies' Federal Complaint implicated important state interests was "the State of Connecticut's state court complaint." Petition at 15. *See also* Amicus Brief at 10. Quite to the contrary, however, defendants offered ample evidence below — which went entirely unrebutted — showing that the aspect of the state's suit with which the Companies' Federal Complaint seeks to interfere — monetary recovery for medical expenses paid — does *not* implicate important state interests sufficient to trigger *Younger* abstention.

As noted above (pp. 3-4), in his pre-suit press statements the Attorney General himself presented his lawsuit as one only

seeking to recover money, arguing that Connecticut residents should support his lawsuit because it may produce a huge monetary recovery for their own benefit. JA260-65. None of his pre-suit press releases even mentioned non-monetary relief. *Id.*

Moreover, in his July 18, 1996 press conference announcing the filing of his lawsuit, the Attorney General continued to make clear that the centerpoint of his suit was to get money from "Big Tobacco," stating that the suit was "unprecedented, not only *in the amount of money* it is seeking to recover, but in the level of public interest in *winning damages* from the tobacco companies." JA253-54 (emphasis added). A news article reporting on that press conference stated that the suit sought $1 *billion* in damages and was "the largest civil lawsuit ever brought by the State of Connecticut." JA253.

As shown by the Companies below, the materials distributed by the Attorney General at his July 1996 press conference announcing his lawsuit were even more blunt:

- Under the heading "What is the State of Connecticut Seeking in this Lawsuit?," the Attorney General stated: "The State of Connecticut *is seeking to recover the more than $100 million* paid each year by the state through the Medicaid Program and other taxpayer-funded health programs to treat tobacco-related illnesses." JA256 (emphasis added).
- Under the heading "If the Suit is Successful, How Will Taxpayers Benefit?," the Attorney General stated: "*A primary purpose* of the suit is *recovery of Medicaid funds* spent by the State of Connecticut. These Medicaid funds come from tax revenues. If the case is successful, it could result in lower health care costs for all Connecticut taxpayers." JA257 (emphasis added).
- Under the heading "Why Should Citizens Support This Lawsuit?," the Attorney General stated: "*The aim of this lawsuit is to make the tobacco industry pay* for the damages it has caused. Any damage

awards recovered in this suit will benefit state taxpayers." JA258 (emphasis added).

Indeed, the Attorney General has gone so far as to sign on private law firms to prosecute his lawsuit on a contingency-fee basis. JA303-06. The Attorney General's contingency-fee agreement with those lawyers, which was also part of the record below, makes clear that, absent an outside source of fees (via a court order or legislative procurement), the "compensation and reimbursement [due the lawyers] . . . is contingent upon *a monetary recovery* being obtained." JA304-05 (emphasis added).

Beyond this, there are other reasons to be skeptical of the Attorney General's purely conclusory assertion that the monetary claims in his state court lawsuit promote the central sovereign functions of the state. As noted above, prior to instituting his lawsuit, the Attorney General twice sought direct authority to bring an action against tobacco companies for monetary recovery of medical expenses paid from the Connecticut General Assembly, to the point of personally giving testimony in support of each of two proposed bills. JA266-302. The General Assembly's refusal to enact those bills is contrary to the Attorney General's self-serving "important state interests" proclamations. *See generally Tileston* v. *Ullman*, 26 A.2d 582, 587 (Conn. 1942); *Blue Cross and Blue Shield of Connecticut, Inc.* v. *Mike*, 439 A.2d 1026, 1031 (Conn. 1981).

Moreover, as is set forth in the Companies' Federal Complaint, for more than 30 years, Connecticut has been making payments under the Medicaid program without so much as seeking to recoup a single payment from any of the Companies; for an even longer period still, Connecticut has officially sanctioned and chosen to collect enormous revenue benefits from the tobacco industry — a minimum of $2 *billion* in tax collection benefits from cigarette sales since the State's participation in Medicaid began. *See* RA 7 (Complaint ¶ 19); JA213. Further, as the Companies also demonstrated below, the State has chosen to invest and continues to hold approximately $100 million of its pension fund investments in tobacco company

securities, and the State itself has long caused tobacco products to be offered for sale in many office buildings, restaurants and other state facilities throughout the state. JA307-14, JA331, JA360, JA206-07, JA201-02.[13]

The Attorney General failed to rebut any of this evidence. Nor did the Attorney General present any evidence showing how the "state interests" he purports to assert in his lawsuit — while *not* being substantial enough (a) to convince the General Assembly to adopt either of the bills that would have purported to authorize his claims against the Companies seeking monetary recovery of medical expenses paid; (b) to motivate the State to file such a lawsuit for a quarter-century; (c) to cause the State now to end its association with the tobacco industry; (d) to cause the State to divest its substantial tobacco stock investments; or even (e) to induce the State now to stop causing cigarettes to be sold and displayed for sale at its own facilities — are nonetheless somehow important state interests sufficient to require *Younger* abstention and to mandate the abdication of jurisdiction over the Companies' federal action seeking to enjoin the State's attempt to obtain a monetary recovery for itself on account of medical expenses paid.

Thus, the Petition totally mischaracterizes the record below, and certiorari review by this Court is not merited for this further reason as well.

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[13] It is well settled that "[i]n deciding whether abstention is appropriate . . . , the Court must . . . accept the truth of all well-pleaded allegations [in the federal complaint] and make all possible inferences in favor of the [federal] plaintiff." *Strasen* v. *Strasen*, 897 F. Supp. 1179, 1184 (E.D. Wis. 1995). *See also, e.g., DeLoreto* v. *Ment*, 944 F. Supp. 1023, 1027 (D. Conn. 1996).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No.: 396CV01221

June 28, 1996

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, LORILLARD TOBACCO COMPANY,

Plaintiffs,

—VS.—

RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT,

Defendant.

COMPLAINT

Plaintiffs, by their undersigned attorneys, allege upon knowledge as to themselves, and otherwise upon information and belief, as follows:

Nature of the Action

1. By this action, plaintiffs seek injunctive relief as well as a declaration pursuant to the federal Declaratory Judgments Act, 28 U.S.C. §§ 2201 *et seq.*, that an actual controversy exists between the plaintiffs and defendant and that the

lawsuit that has been imminently threatened by defendant against plaintiffs, purportedly to recover certain Medicaid payments made by the State of Connecticut, would violate plaintiffs' rights under the United States Constitution and federal statutes.

2. This action seeks to prevent defendant from singling out a category of out-of-state manufacturers and imposing upon them a retroactive, unprecedented, and devastating financial burden in an effort to significantly impede the channels of interstate commerce to a lawful product — cigarettes — at the expense of plaintiffs' federal constitutional and statutory rights.

Jurisdiction and Venue

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1367. Venue is proper in this District under 28 U.S.C. § 1391(b).

Parties

4. Plaintiff Philip Morris Incorporated, a manufacturer of cigarettes, is a Virginia corporation whose principal place of business is 120 Park Avenue, New York, New York 10017.

5. Plaintiff R.J. Reynolds Tobacco Company, a manufacturer of cigarettes, is a New Jersey corporation whose principal place of business is 4th and Main Street, Winston-Salem, North Carolina 27102.

6. Plaintiff Brown & Williamson Tobacco Corporation, a manufacturer of cigarettes, is a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky 40202.

7. Plaintiff Lorillard Tobacco Company, a manufacturer of cigarettes, is a Delaware corporation whose principal place of business is 1 Park Avenue, New York, New York 10016.

8. Defendant Richard Blumenthal is the Attorney General of Connecticut.

Background

9. For months, defendant has been preparing to bring on behalf of the State of Connecticut a lawsuit (the "Threatened Lawsuit") seeking hundreds of millions of dollars from plaintiffs, which are cigarette manufacturing companies that are incorporated and have their principal place of business outside of Connecticut. The theory of the Threatened Lawsuit is that, under various provisions and/or principles of state law, plaintiffs should be required — both retroactively and prospectively — to pay for Medicaid payments that Connecticut voluntarily undertook to make to its Medicaid-eligible residents, wholly irrespective of whether plaintiffs would have any liability under established principles of law to pay for the medical care of any actual Medicaid recipient.

10. The Threatened Lawsuit would have purported to have been authorized by a bill which was introduced in the Connecticut General Assembly in the 1996 session but failed to be enacted into law (the "Failed Bill"). The Failed Bill (1996 House Bill 5817) would have provided that:

> The state of Connecticut may recover against *any manufacturer of tobacco products* the full amount of medical assistance provided by the state of Connecticut . . . which is attributable to the use of cigarettes or other tobacco products pursuant to the Title XIX Medicaid program, and reasonable attorney's fees and costs. The state's rights under this section are *independent of any rights or causes of action of the recipient or applicant.* In an action brought pursuant to this section, *the issue of causation may be proven by epidemiological studies or statistical evidence and the contributory negligence, comparative negligence or assumption of risk of the applicant or recipient shall not bar recovery nor dimin-*

> *ish the award of damages*. The portion of the costs of medical assistance provided by the state of Connecticut which are attributable to the manufacturer of tobacco products shall be presumed to be equivalent to the portion of total sales, in this state, of such product that are attributable to the manufacturer for the period of time for which reimbursement is sought. (emphasis added)

The Failed Bill contained the following "Statement of Purpose": "To *authorize* the Attorney General to bring an action against any manufacturer of tobacco products to recover the costs of medical assistance that is attributable to the use of cigarettes or other tobacco products." (emphasis added)

11. Notwithstanding that the Failed Bill — which on its face would have purported to "authorize" the Attorney General to bring the Threatened Lawsuit — was *not* enacted into law, defendant nonetheless is proceeding with his plan to bring the Threatened Lawsuit. In his testimony before the Judiciary Committee concerning the Failed Bill, defendant proclaimed that the Failed Bill would merely "put in statute *the current state of the common law*" (emphasis added). According to the defendant's testimony, both the Failed Bill and the "current state of the common law" (as interpreted by defendant) (i) "clearly authorize the Attorney General to bring an action to recoup . . . health care expenses caused by tobacco products"; (ii) "allow the state to prove causation between the tobacco product and the disease by statistical evidence or epidemiological studies"; (iii) "prohibit[ ] the defense of contributory/comparative negligence or assumption of risk of the patient by the tobacco company"; and (iv) "apportion damages among the tobacco industry based on market share of the tobacco companies."

12. Defendant will claim in the Threatened Lawsuit that the State is entitled to recover Medicaid payments from plaintiffs (i) on a retroactive basis, and (ii) without regard to some or all of the elements of proof that any actual Medicaid recipient would be required to establish to recover medical costs

from plaintiffs, and some or all of the defenses that plaintiffs would have against any actual Medicaid recipient. This is apparent from, among other things, (i) published reports concerning public statements made by defendant regarding the nature and magnitude of claims that the defendant is planning to assert in the Threatened Lawsuit (as alleged below at ¶¶ 41-47); (ii) the testimony of the Attorney General before the Judiciary Committee on the Failed Bill (quoted in part above at ¶ 11); and (iii) the fact that defendant is acting in concert with Attorneys General of several other states who have brought similar suits, who have all sought to impose liability retroactively and without regard to whether any individual Medicaid recipient would have any claim against any cigarette manufacturer (as alleged below at ¶¶ 14-15).

13. The threatened conduct of defendant violates fundamental principles of federal constitutional law. Plaintiffs are entitled to injunctive relief barring the defendant from bringing, prosecuting, or imposing or enforcing liability pursuant to the Threatened Lawsuit, as well as a declaration that the Threatened Lawsuit violates plaintiffs' federal constitutional and statutory rights.

14. In the past two years, nine similar lawsuits have been brought by the Attorneys General of nine other states: Florida, Mississippi, Minnesota, West Virginia, Massachusetts, Louisiana, Texas, Maryland, and Washington. In each of those suits, the Attorneys General have sought to impose liability retroactively — in the Minnesota case, all the way back to 1977 — and have taken the position that liability may be assessed without regard to whether any individual Medicaid recipient would have any claim against any tobacco company. With the assistance of the Attorneys General that have already brought suit and various anti-tobacco groups, defendant is preparing to bring suit as well. On April 1, 1996, the *Reuters News Service* quoted Attorney General Blumenthal as saying that he was "very close" to bringing suit. And on May 2, 1996, the *New York Times* reported that Connecti-

cut had publicly "announced [its] plans yesterday to sue the tobacco industry." The *New York Times* article reported that, according to Attorney General Blumenthal, the suit "would seek hundreds of millions of dollars in damages."

15. Defendant, in preparing to bring the Threatened Lawsuit, is acting in concert with the Attorneys General who have brought similar suits thus far, anti-tobacco groups, and others. As was reported by the *States News Service* on March 25, 1996, defendant attended the spring meeting of the National Association of Attorneys General to "consult and plot strategy with . . . colleagues who have already filed similar suits."

16. The Threatened Lawsuit violates basic principles of constitutional law under the United States Constitution. The Threatened Lawsuit seeks to impose upon plaintiffs on a retroactive basis massive costs of the Medicaid program that Connecticut has voluntarily chosen to establish, irrespective of traditional principles of law governing the rights and duties of plaintiffs with respect to any actual Medicaid recipient.

17. Innumerable factors may contribute to the costs of Medicaid: inefficiency and/or corruption in the state system; random (and often reckless) individual choices such as driving over the speed limit; the pervasiveness of air pollution; automobiles; handguns; alcohol; unhealthy foods; and so on. Moreover, myriad business decisions and government policies that make individuals unable to rise economically above the Medicaid level contribute substantially to the costs of Medicaid — for example, low wages, plant closings and job eliminations that leave employees unable to pay their own medical bills. Connecticut's attempt to impose massive costs upon out-of-state cigarette manufacturers without regard to pre-established tort law principles and defenses is arbitrary and violates the United States Constitution.

18. Moreover, notwithstanding the publicly articulated views of many going back a century or more that smoking

tobacco is injurious to health, cigarettes have expressly been sanctioned as an article of interstate commerce; have been regulated (but not prohibited); and have been utilized as a revenue-producing vehicle both by the United States Government and the individual states, including Connecticut.

19. Indeed, in 1994 alone, Connecticut generated over $118 million in revenue from state cigarette taxes, and Connecticut has since 1965 (the year the federal Medicaid Act was enacted and the first year Connecticut chose to participate in Medicaid) generated over *two billion* dollars in state cigarette taxes. Connecticut's retroactive attempt to shift the burden of Medicaid costs it has voluntarily undertaken to make to out-of-state manufacturers of a lawful product that the state has for many years countenanced, regulated and from which it has generated enormous revenues through taxation is unlawful.

20. Congress struck a careful balance in the Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health Cigarette Smoking Act of 1969, among (i) recognizing the importance of cigarettes to our national economy and the economies of tobacco growing and manufacturing states by facilitating the sale of cigarettes in interstate commerce; (ii) providing that a warning label be placed on each package of cigarettes; and (iii) allowing individual customers to exercise their personal freedom of choice to smoke or not to smoke. Congress mandated that a warning label be placed on all cigarette packages sold in the United States, but that cigarette packages so labeled could be sold in the United States free of all state "requirements or prohibitions" based on smoking and health with respect to, *inter alia*, the promotion of cigarettes. In enacting these statutes, Congress expressly stated as one of its purposes that "commerce and the national economy . . . be protected to the maximum extent consistent with [the] declared policy" of "adequately inform[ing] [the public] that cigarette smoking may be hazardous to health." 15 U.S.C. § 1331. Subsequently,

the Supreme Court has expressly recognized that lawsuits seeking damages constitute "requirements or prohibitions" by the states within the meaning of these federal statutes. *See Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

21. The potential impact of the Threatened Lawsuit on interstate commerce is enormous and far reaching. The Threatened Lawsuit (like the other similar lawsuits in other states) seeks unlawfully to significantly impede interstate commerce in cigarettes. While the individual states could not constitutionally legislate this result directly, these lawsuits attempt to shift retroactively massive costs of the Medicaid program to plaintiffs and arbitrarily to impose on plaintiffs massive ongoing costs.

22. Even if the provisions of Connecticut Law relied upon by defendant were construed to apply only prospectively, they would still (as otherwise interpreted by defendant) constitute an improper and illegal burden on interstate commerce by imposing massive ongoing costs upon the plaintiffs. In light of the inherent mobility of the American population, the constitutional right to travel, and the ability to purchase cigarettes in neighboring states, plaintiffs could not insulate themselves from the draconian liability sought to be imposed by defendant (or the other states in which Attorneys General have brought suit).

23. The Threatened Lawsuit, and the provisions of Connecticut Law relied upon by defendant as interpreted by him, violate plaintiffs' rights under the United States Constitution. As further set forth below, they constitute an improper and illegal attempt by the State to burden interstate commerce, violate plaintiffs' rights under the Due Process Clause, Equal Protection Clause, Taking Clause, and plaintiffs' First Amendment rights. Moreover, the Threatened Lawsuit and the provisions of Connecticut Law relied upon by defendant (as interpreted by him) violate the Supremacy Clause because they are preempted by and inconsistent with the federal Med-

icaid Act and the Public Health Cigarette Smoking Act of 1969.

24. Plaintiffs are entitled to injunctive relief barring the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit. Plaintiffs are also entitled to a declaration that the threatened conduct of defendant is in violation of plaintiffs' constitutional rights and federal statutory rights, and that the provisions of Connecticut Law relied upon by defendant, if construed in the manner in which defendant will claim in the Threatened Lawsuit, are unconstitutional.

The Medicaid Program

25. By virtue of the Threatened Lawsuit, defendant seeks to recover from plaintiffs payments voluntarily made by Connecticut under the program established under Title XIX of the Social Security Act, commonly known as the Medicaid Act, 42 U.S.C. § 1396 *et seq*. Under the Medicaid Act, participating states receive federal financial assistance for administering a medical treatment program in accordance with the requirements of the comprehensive federal scheme set forth in the Medicaid Act and regulations promulgated thereunder.

26. Under the Medicaid Act, no state is obligated to participate in the Medicaid program. However, states that choose to participate in the Medicaid program, and thus who seek to become eligible for federal funding, must develop a state plan that conforms with the comprehensive federal requirements. The state plan must be approved by the United States Department of Health and Human Services. 42 U.S.C. §§ 1396a, 1396c. Connecticut has since 1965 chosen to participate in the federal Medicaid program.

27. The percentage of federal funds available to each state under the federal Medicaid program varies from state to state based upon a federal formula that takes into account the per

capita income of residents of the state as compared to the national average. In 1994, the federal government paid 50% of the funds relating to Connecticut's participation in the Medicaid program, and the federal government pays for some states up to 80% of the funds applicable to their participation.

28. In recognition of the fact that the United States government provides the major source of funding for the Medicaid programs throughout the country, the Medicaid Act and the regulations thereunder create a detailed system for the recovery of monies paid out under the Medicaid program where third parties are found to be liable for their payment.

29. Thus, under the Medicaid Act and the regulations thereunder, a state Medicaid plan must provide that each recipient assign to a duly designated single state Medicaid agency his or her rights to payment for medical care from any third party. *See* 42 U.S.C. §§ 1396a(a)(45), 1396k; 42 C.F.R. §§ 433.145-.148. The single state agency, as the assignee of those rights, must take reasonable measures to determine the legal liability of third parties to pay for services furnished under the Medicaid plan to any recipient, and must fulfill the requirements of the Medicaid Act and regulations with regard to establishing liability and seeking reimbursement from third parties. *See* 42 U.S.C. § 1396a(a)(25), 42 C.F.R. §§ 433.135-.148.

30. The Medicaid Act and regulations also require that if a state receives reimbursement of Medicaid payments from a liable third party, the state must pay the federal government the applicable federal share of the reimbursement (net of an incentive payment to the state applicable under the regulations). *See* 42 U.S.C. § 1396b(d); 42 C.F.R. § 433.140(c); 42 C.F.R. § 433.154.

31. Under the applicable regulations, "[i]f the agency learns of the existence of a liable third party after a claim is paid . . . the agency must seek recovery of reimbursement within 60 days after the end of the month it learns of the exis-

tence of the liable third party." 42 C.F.R. § 433.139(d)(2). Reimbursement by the state agency "must be sought unless the agency determines that recovery would not be cost effective." 42 C.F.R. § 433.139(d)(3).

32. If the state agency fails to fulfill these or any of the other requirements with regard to establishing liability and seeking reimbursement from third parties, it loses its right to federal financial participation in Medicaid payments. 42 C.F.R. § 433.140(a)(1). Yet, despite this severe consequence for failing promptly to seek reimbursement from a third party, and despite widespread and longstanding public allegations that smoking leads to increased health care costs, the State of Connecticut has never in the over 30 years since the Medicaid Act was enacted sought to recover a single Medicaid payment from a cigarette manufacturer, or to bring any lawsuit similar to the Threatened Lawsuit against any third party purporting to act in a capacity "independent" of the rights of actual Medicaid recipients. Nor has any such suit ever been authorized anywhere in the country by the United States Department of Health and Human Services, the federal agency responsible for administering the Medicaid Act and regulations.

33. It is plain from the face of the Medicaid statute and the applicable regulations — and is confirmed by the actions of the state and federal agencies for over 30 years in administering the Act — that the federal statutory and regulatory framework contemplates only suits to recover costs of medical assistance from insurers or other third parties who are liable to individual Medicaid recipients. For example, there are detailed federal regulations regarding the establishment of paternity and recovery against out-of-wedlock fathers, and express requirements that recipients (among other things) release their medical records and appear as witnesses in court if needed. *E.g.*, 42 C.F.R. § 433.147. But nothing in the federal scheme discusses or remotely authorizes mass suits against an industry on any theory (much less one whereby the state could proceed without proof of any elements of an indi-

vidual Medicaid recipient's legal claim and without being subject to some or all of the defenses applicable to an individual Medicaid recipient's legal claim), or authorizes the states to single out any particular industry for disparate treatment.

The Connecticut State Medicaid Plan

34. The Connecticut State Medicaid Plan (the "State Plan") approved by the United States Department of Health and Human Services is not on its face inconsistent with the federal requirements discussed above.

35. Thus, the section of the State Plan entitled "Third Party Liability" states that "The Medicaid Agency meets all requirements of: (1) 42 C.F.R. 433.138 and 433.139; (2) 42 C.F.R. 433.145 through 433.148; (3) C.F.R. 433.151 through 433.154; [and] (4) Section 1902(a)(25)(H) and (I) of the Act." As discussed above, these sections provide (among other things) for each Medicaid recipient to assign to the state Medicaid agency his or her rights to payment for medical care from any third party; for the state agency to take reasonable measures as assignee of those rights to determine the legal liability of third parties to pay for services furnished under the Medicaid plan to any Medicaid recipient; for the state agency to seek recovery of reimbursement within 60 days after the end of the month it learns of the existence of a liable third party; and for the state to pay the federal government the applicable federal share of any monies recovered from third parties.

36. In addition, an Attachment incorporated by reference into the Connecticut state plan, in a section titled "Guidelines Used in Determining Whether to Seek Reimbursement from Liable Third Parties," states that the Connecticut State Agency responsible for administering the Medicaid program takes action "to recover payments in excess of $500 for claims associated with accident/casualty situations." How-

ever, as noted above, in the over 30 years that Connecticut has participated in Medicaid, and despite the widespread public assertions that smoking tobacco is injurious to health, no claim has ever been asserted by the Connecticut State Agency against any plaintiff herein seeking recovery for any medical service provided to any individual that was paid for by Medicaid.

The Applicable Connecticut Statutory Provisions

37. The Connecticut statutory provisions governing third party liability with regard to Medicaid payments likewise are on their face consistent with the federal requirements discussed above. Specifically, Conn. Stat. § 17b-265 provides:

> *In accordance with 42 U.S.C. § 1396k, the department of social services shall be subrogated to any right of recovery* or indemnification which an applicant or recipient of medical assistance or any legally liable relative has against a private insurer or other third party, as defined in 42 C.F.R. 433.136, for the cost of hospitalization, pharmaceutical services, physician services, nursing services and other medical services, not to exceed the amount expended by the department for such care and treatment of the applicant or recipient. An applicant or recipient or legally liable relative, *by the act of the applicant or recipient receiving medical assistance, shall be deemed to have made a subrogation assignment and an assignment of claim for benefits to the department.* . . . This subsection shall not be construed to affect *the right of an applicant or recipient to maintain an independent cause of action* against such third party tortfeasor. (emphasis added)

This provision is consistent with the federally mandated scheme set forth in 42 U.S.C. §§ 1396a(a)(45) and 1396k and 42 C.F.R. §§ 433.145-.148 whereby each Medicaid recipient is required to assign his/her rights to the single designated

state Medicaid agency, and this state agency is required to act as assignee of those rights to seek third party reimbursement. While this section permits an *individual Medicaid recipient* to "maintain an independent cause of action" against a third party, it does *not* permit the *state* to maintain an "independent cause of action" such as the Attorney General has threatened to bring by virtue of the Threatened Lawsuit, but rather provides for the duly designated state Medicaid agency to proceed by virtue of the assignment/subrogation mechanism mandated by the federal Medicaid Act.

38. Other provisions of Connecticut law likewise make clear that the assignment/subrogation scheme mandated by federal law is the mechanism pursuant to which the state is required to seek to recover Medicaid payments from third parties. Under Conn. Stat. § 17b-260, the Connecticut Medicaid program is required to be "administer[ed] in accordance with the requirements" of the federal Medicaid Act. And, under Conn. Stat. § 17b-264, state statutory provisions (including the third-party liability/subrogation provision quoted in ¶ 37, *supra*) are extended to the Connecticut Medicaid program only if they are not "inconsistent with federal law and regulations governing Title XIX of the Social Security Amendments of 1965 [*i.e.*, the federal Medicaid Act and regulations]."

39. The Connecticut State Medicaid Plan that has been approved by the United States Department of Health and Human Services, discussed above in ¶¶ 34-36, likewise is consistent with these federal requirements. Nothing in the State Plan remotely authorizes a lawsuit by the state "independent" of any right or cause of action assigned to it by any actual Medicaid recipient by virtue of the Medicaid Act and the regulations thereunder. Nor does anything in the State Plan authorize a lawsuit against a particular industry for Medicaid payments, or authorize the Attorney General to bring any lawsuit seeking to recover any Medicaid payments.

40. As noted above (¶ 10), despite the publicly-stated intention of defendant to bring the Threatened Lawsuit, the Connecticut Legislature has *not* adopted a proposed bill which would have at least on its face purported to have authorized the defendant to bring an action against tobacco companies seeking to recover Medicaid moneys, and to assert the claims that are threatened to be asserted in the Threatened Lawsuit. Thus, on March 13, 1996, Representative Ellen Scalettar sponsored a new bill (House Bill No. 5817) in the Connecticut General Assembly titled "An Act Concerning Recovery of State Costs for Treatment of Tobacco-Related Diseases." The "Statement of Purpose" of the bill was: "To *authorize* the Attorney General to bring an action against any manufacturer of tobacco products to recover the costs of medical assistance that is attributable to the use of cigarettes or other tobacco products." (emphasis added) The bill would have purported to give the state rights "independent of any rights or causes of action of the recipient or applicant," and would have provided that "the issue of causation may be proven by epidemiological studies or statistical evidence, and the contributory negligence, comparative negligence or assumption of risk of the applicant or recipient shall not bar recovery nor diminish the award of damages." But, despite testimony by the Attorney General in support of the Bill, House Bill No. 5817 was *not* enacted into law.

The Threatened Lawsuit by the Connecticut Attorney General

41. The Connecticut Attorney General has for months been preparing to file the Threatened Lawsuit against plaintiffs to recover Medicaid-related payments, purporting to act not simply as subrogee or assignee of the individual recipients in conformity with the federal requirements under the Medicaid Act and the state statutory provisions incorporating those federal requirements, but in an "independent" capacity.

42. Thus, on March 25, 1996, the *Connecticut Law Tribune* reported that defendant was "close to bringing suit against the tobacco industry to recover state costs for tobacco-related illnesses — if the General Assembly backs the gambit." This report stated that defendant had "proposed to the Judiciary Committee . . . changes in state law [House Bill 5817, discussed in ¶¶ 10-11, 40, above] that would strengthen Connecticut's position in court by blocking the tobacco industry's defenses in litigation." Defendant was quoted as saying that he was "preparing actively for a lawsuit", and that such a lawsuit would "probably" not be filed "before the [current legislative] session ends [May 8, 1996] and until we know if the General Assembly will approve some or all of the measures we have asked for [in House Bill 5817]."

43. Also on March 25, 1996, the *State News Service* reported that "Connecticut could file a lawsuit against the major tobacco companies within several weeks, seeking millions in repayment for Medicaid and Medicare expenses for tobacco-related illnesses." This report quoted defendant as saying that it was "morally reprehensible" for taxpayers to bear the costs of diseases attributable to smoking, and that the Threatened Lawsuit would seek "to recover for Connecticut taxpayers" health care costs "borne for years now" attributed to smoking, which defendant estimated as "$900 million".

44. On April 1, 1996 the *Reuters News Service* quoted defendant as saying "I think we are very close" to filing suit.

45. Although the Failed Bill was not enacted into law, defendant nevertheless has publicly announced that he still intends to proceed with the Threatened Lawsuit. Thus, on May 2, 1996, the *New York Times* reported that Connecticut had "announced [its] plans yesterday to sue the tobacco industry." The *New York Times* report stated that, according to defendant, the suit "would seek hundreds of millions of dollars in damages."

46. On May 6, 1996, the *Connecticut Law Tribune* reported that defendant had "filed notices with newspapers across the state, including the Connecticut Law Tribune, seeking proposals for law firms to work with his office on the suit" on a contingency fee basis. The report stated that such proposals were due to be received by the Attorney General on or before May 20, and that the Attorney General "hope[d] to file the suit by late spring or early summer."

47. In a May 27, 1996 article in the *Connecticut Law Tribune* entitled "A Piece of the Action," it was reported that defendant had received 14 proposals from law firms seeking to be hired on a contingency fee basis to bring the Threatened Lawsuit, and defendant was quoted as saying that he planned "to make a choice among them . . . some time in June."

Plaintiffs' Need for Declaratory and Injunctive Relief

48. Plaintiffs need the declaratory and injunctive relief sought herein in order to settle and protect their reasonable investment-backed expectations and economic rights to continue to manufacture and sell cigarettes in the United States free from unconstitutional and illegal imposition of liability. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by the defendant, place into question plaintiffs' liability for past, present and future sale of their products in interstate commerce and will (if held to be constitutional) necessarily affect plaintiffs' business on a going-forward basis. Plaintiffs believe that the Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies as interpreted by defendant are plainly unconstitutional, but defendant contends to the contrary. Plaintiffs are entitled to a declaration on this issue so that Plaintiffs' legal rights and any questions about their liability for past, present and future sales are resolved and so that they may determine whether the claims in the Threatened Lawsuit and the provisions of Connecticut Law upon which

defendant relies will have any effects on their businesses and, if necessary, take appropriate actions. It is anticipated that defendant will bring the Threatened Lawsuit in state court, and plaintiffs are entitled to have a federal court resolve the federal constitutional and statutory claims raised herein. In addition, the Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by the defendant, raise the spectre of massive liability. Plaintiffs are entitled to injunctive relief barring defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

First Claim for Relief
(Commerce Clause)

49. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

50. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, would impose a severe burden on interstate commerce by shifting to plaintiffs massive costs of the state Medicaid program voluntarily undertaken by Connecticut. The effect of the Threatened Lawsuit (and the similar pending lawsuits in other states) and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, would be to impose ongoing massive costs upon the plaintiffs and adversely impact the sale of cigarettes in interstate commerce. In light of the inherent mobility of the American population, the Constitutional right to travel, and the ability to purchase cigarettes in neighboring states, plaintiffs could not insulate themselves from the draconian liability sought to be imposed by defendant (or the Attorneys General of the other states that have brought suit).

51. Moreover, Connecticut has sought to impose these massive costs on cigarettes — a product manufactured outside the State of Connecticut.

52. The principles of state law relied upon by defendant in the Threatened Lawsuit, as interpreted by the defendant, constitute an improper interference by Connecticut in interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3.

Second Claim for Relief
(Due Process)

53. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

54. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, seek to relieve the State of Connecticut of its own voluntarily-undertaken obligations (by choosing to participate in the Medicaid program) to pay Medicaid expenses to Medicaid-eligible individuals, at the expense of severely impairing the rights of plaintiffs, which are all out-of-state businesses.

55. As interpreted by defendant, the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit entitle the State of Connecticut to recover Medicaid payments from plaintiffs (i) on a retroactive basis, and (ii) without regard to some or all of the elements of proof that any actual Medicaid recipient would be required to establish to recover medical costs from plaintiffs, and some or all of the defenses that plaintiffs would have against any actual Medicaid recipient. Defendant intends to impose this massive and radical departure from law on cigarettes — a lawful product — to the exclusion of numerous other products and activities that may contribute to the costs of Medicaid. Defendant seeks retroactively to impose liability on plaintiffs arising from past conduct that the state has for many years countenanced and regulated and from which it has generated enormous revenue through taxation.

56. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are invalid under the Fourteenth Amendment to the United States Constitution, in that they permit a deprivation of property without due process of law.

57. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are unconstitutional for the further reason that the manner in which they are sought to be applied by defendant deprives plaintiffs of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Third Claim for Relief
(Equal Protection)

58. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

59. Despite the fact that there are myriad factors that may contribute to the costs of Medicaid, the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, arbitrarily seek to impose massive costs upon cigarette manufacturers retroactively and prospectively without regard to established legal principles and irrespective of any rights and defenses cigarette manufacturers would have against any actual Medicaid recipient.

60. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Fourth Claim for Relief
(Supremacy Clause; Medicaid Preemption)

61. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

62. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are in conflict with (and are thus preempted by) the Medicaid Act and regulations, including but not limited to in the following respects: (1) by allowing the state to sue in a capacity "independent" of the rights of actual Medicaid recipients, rather than pursuant to the assignment/subrogation scheme mandated by federal law; (2) by allowing the state to bring a mass suit rather than a suit relating to specific individual Medicaid recipients; (3) by allowing the state to bring a mass suit against companies in a particular industry; (4) by allowing the state to sue beyond the 60-day limitations period mandated by 42 C.F.R. § 433.139(d)(2); (5) by allowing the state to bring a suit not authorized by the State Medicaid Plan approved by the United States Department of Health and Human Services; and (6) by permitting the Attorney General to bring suit against the cigarette manufacturers in violation of the "single State agency" requirement of federal law.

63. In addition, in light of the comprehensive scheme established by the federal Medicaid Act and the regulations promulgated thereunder, even apart from specific conflicts (including those enumerated in ¶ 62 above), the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are preempted by the Medicaid Act and regulations thereunder.

64. Further, as described above, under the comprehensive system set forth in the Medicaid Act and regulations promulgated thereunder, Connecticut is only authorized to bring against plaintiffs claims for third-party liability for Medicaid payments with respect to the rights (if any) that individual Medicaid recipients might have against plaintiffs. Accord-

ingly, the provisions of Connecticut Law upon which defendant relies, to the extent that they purport to authorize an "independent cause of action" in favor of the State of Connecticut, conflict with the Medicaid Act and regulations thereunder.

65. Accordingly, the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit are inconsistent with and preempted by the Medicaid Act and regulations thereunder and violate the Supremacy Clause of the United States Constitution.

Fifth Claim for Relief
(Supremacy Clause; Preemption Under the Public Health Cigarette Smoking Act of 1969)

66. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

67. In enacting the Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health Smoking Act of 1969, Congress struck a careful balance among (i) recognizing the importance of cigarettes to our national economy and the economies of tobacco growing and manufacturing states by facilitating the sale of cigarettes in interstate commerce; (ii) providing that a warning label be placed on each package of cigarettes; and (iii) allowing individual customers to exercise their personal freedom of choice to smoke or not to smoke. Congress required that the statement "WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH" (or a variation thereof) be printed in a prominent place on all packages of cigarettes sold in the United States. In addition, Section 5(b) of the Public Health Cigarette Smoking Act of 1969 provided that "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled

in conformity with the provisions of this chapter." 15 U.S.C. § 1334.

68. Congress expressly stated that one of its purposes for providing for uniform warnings and in preempting any other state law "requirements or prohibitions" as aforesaid was that "commerce and the national economy . . . be protected to the maximum extent consistent with [the] declared policy" of "adequately inform[ing] [the public] that cigarette smoking may be hazardous to health." 15 U.S.C. § 1331. The Supreme Court has held that lawsuits seeking damages constitute "requirement[s] or prohibition[s]" by the states within the meaning of these federal statutes. *See Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

69. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies (as interpreted by defendant) impose a "requirement or prohibition" based on smoking and health with respect to the promotion and advertising of cigarettes by seeking to impose massive costs of the state Medicaid program upon plaintiffs irrespective of plaintiffs' rights and duties with respect to any actual Medicaid recipient.

70. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are accordingly preempted by the Public Health Cigarette Smoking Act of 1969 and violate the Supremacy Clause of the United States Constitution.

Sixth Claim for Relief
(Taking of Property)

71. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

72. The Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, by seeking to extract from cigarette manufacturers

Medicaid payments retroactively and prospectively without regard to established legal principles and irrespective of any rights and defenses cigarette manufacturers would have against any actual Medicaid recipient, would create a severe economic impact upon plaintiffs and greatly interfere with plaintiffs' settled investment-backed expectations.

73. The nature of the state's action through the Threatened Lawsuit and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, would constitute in essence a confiscation of plaintiffs' property by the state.

74. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate plaintiffs' rights under the Taking of Property Clause of the Fifth Amendment to the United States Constitution which is made applicable to the states under the Fourteenth Amendment to the United States Constitution.

Seventh Claim for Relief
(First Amendment)

75. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

76. Despite the fact that the United States Surgeon General had concluded in 1964 that smoking cigarettes is not an "addiction," defendant will claim in the Threatened Lawsuit that plaintiffs violated state law by contesting the highly-publicized assertions going back at least to the 1960s by certain government officials (including the Surgeon General in 1988), anti-tobacco groups, and others that nicotine, a substance found naturally in tobacco and cigarettes, is "addictive."

77. Plaintiffs have the right under the First Amendment of the United States Constitution to express their views on this public issue. State laws or actions may not constitutionally be used to stifle debate on controverted public issues so as to enshrine the government's side of a disputed issue as official

orthodoxy, with any dissent being proscribed as "fraud." Nor may the state impose massive confiscatory penalties for plaintiffs' expression of disagreement with the views of government officials on this issue, with the monies extracted by the state being used to reinforce the state's views on this issue through anti-smoking programs and campaigns that are contrary to the views held by such manufacturers, who would thus be compelled to pay for speech with which they disagree.

78. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, would deprive plaintiffs of their rights under the First and Fourteenth Amendments to the United States Constitution.

Eighth Claim for Relief
(Deprivation of Plaintiffs' Constitutional and Federal Law Rights Under Color of State Law)

79. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

80. Defendant has been acting in concert and with the encouragement and substantial assistance of certain anti-tobacco activists, Attorneys General in certain other states, members of plaintiffs' contingency fee bar, and others in preparing the Threatened Lawsuit and in seeking to foster similar lawsuits by other like-minded Attorneys General as part of an effort that would, if successful, deprive plaintiffs of rights secured by the Constitution and laws of the United States as alleged above.

81. The provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, would deprive plaintiffs of rights secured by the Constitution and laws of the United States under color of state law in violation of 42 U.S.C. § 1983.

Ninth Claim for Relief
(Connecticut State Constitutional, Statutory, and Common Law Claims)

82. Plaintiffs repeat and reallege paragraphs 1 through 48 hereof.

83. This claim for relief raises various grounds arising under the Connecticut State Constitution, Connecticut statutes, and Connecticut common law if and to the extent that such grounds may properly be presented in federal court and are cognizable by this Court in this action.

84. The provisions of Connecticut Law upon which defendant relies should not be construed to provide that the State is entitled to recover medical assistance payments from plaintiffs (i) on a retroactive basis; or (ii) without proof of each element of an individual Medicaid recipient's legal claim and without being subject to each of the defenses applicable to an individual Medicaid recipient's legal claim.

85. The Threatened Lawsuit, the claims to be asserted in the Threatened Lawsuit, and the provisions of Connecticut Law upon which defendant relies (as interpreted by defendant) violate or are precluded by the Connecticut State Constitution, Connecticut statutes, and Connecticut common law with respect to the following provisions thereof, among others: (a) equal protection under the Connecticut Constitution Article First, Sections 1 and 20; (b) liberty of speech under the Connecticut Constitution Article First, Sections 4 and 5; (c) due process protection under the Connecticut Constitution Article First, Sections 8, 9 and 10; (d) protection against the taking of property without just compensation under the Connecticut Constitution Article First, Section 11; (e) separation of powers under the Connecticut Constitution Article Second; (f) statutory limits on defendant's authority, including but not limited to those contained in Title 3 and Title 4 of the Connecticut General Statutes; and (g) Connecticut common law principles, including but not limited to principles of laches, unclean hands, waiver, estoppel, and mitigation of damages.

WHEREFORE, plaintiffs respectfully demand judgment as follows:

A. On their First Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the Commerce Clause of the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

B. On their Second Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are invalid, and unconstitutional as applied to plaintiffs, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

C. On their Third Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

D. On their Fourth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit are preempted by the Medicaid Act and the regulations promulgated thereunder and violate the Supremacy Clause of the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

E. On their Fifth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, are preempted by the Public Health Cigarette Smoking Act of 1969

and violate the Supremacy Clause of the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

F. On their Sixth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the Taking of Property Clause of the Fifth Amendment to the United States Constitution, which is made applicable to the States under the Fourteenth Amendment to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

G. On their Seventh Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, violate the First and Fourteenth Amendments to the United States Constitution, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

H. On their Eighth Claim for Relief, declaring that the provisions of Connecticut Law upon which defendant relies in the Threatened Lawsuit, as interpreted by defendant, would deprive plaintiffs of rights secured by the Constitution and Laws of the United States under color of state law, in violation of 42 U.S.C. § 1983, and permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

I. On their Ninth Claim for Relief, declaring that the Threatened Lawsuit, the claims to be asserted therein, and the provisions of Connecticut Law upon which defendant relies, as interpreted by defendant, violate the Connecticut State Constitution, Connecticut statutes, and Connecticut common law in the respects set forth in the Ninth Claim for Relief, and to the extent that such an injunction premised on such violations may properly be sought and is cognizable by this Court,

permanently enjoining the defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

J. Awarding plaintiffs their costs and disbursements, including reasonable attorneys' fees, incurred in connection with this action.

K. Awarding plaintiffs such other and further relief as to the Court may seem just and proper.

Dated: June 28, 1996

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In The
Supreme Court Of The United States

October Term, 1997

RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF CONNECTICUT,
Petitioner

v.

PHILIP MORRIS, INC., ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Petitioner, Richard Blumenthal, Attorney General for the State of Connecticut, submits this reply brief in support of his petition for a writ of certiorari.

As the Amici accurately point out, "[t]his Court has never held that where a State brought a judicial proceeding, the state interest was of insufficient magnitude to justify *Younger* abstention." (Amicus Brief at 5) The tobacco companies claim, however, to have identified cases for the first time that *are* of such insignificant magnitude -- the landmark actions of 44 states and other jurisdictions seeking broad remedial relief to enjoin and correct the companies' deceptive unfair and anti-competitive practices, as well as to recoup billions of dollars in damages caused by the tobacco companies and their products.

The tobacco companies' misunderstanding of proper *Younger* analysis, parroting the Court of Appeals' similar misunderstanding, demonstrates perfectly why this Court should exercise jurisdiction to review the Court of Appeals' decision. The Court of Appeals' conclusion that no important state interest is implicated in this case so far departs from this Court's precedents, as well as from any logical application of *Younger* principles, that this Court's review is warranted. Further, the tobacco companies' view that they can avoid *Younger* principles by bringing a federal challenge to a portion, or "one aspect," of Connecticut's state court action, is without precedent and defies both the concepts underpinning the *Younger* doctrine and the realities of such dual track litigation.[1/]

[1/] The tobacco companies continue to recite as their mantra the proposition that abstention is reserved for "exceptional circumstances." (Opposition at 18) The Petitioner does not dispute this as a general matter. The specific rule applicable to *Younger*, however, is that a federal plaintiff's attempt to enjoin an ongoing state proceeding that involves an important state interest is itself an "extraordinary circumstance" that "justif[ies] abdication of the virtually unflagging obligation . . . to exercise the jurisdiction

I. EVEN IF CONNECTICUT'S STATE COURT ACTION ONLY SOUGHT MONEY DAMAGES, IT WOULD STILL IMPLICATE AN IMPORTANT STATE INTEREST.

The tobacco companies claim, and the Court of Appeals concluded, that if a sovereign state plaintiff seeks money damages in state court and the federal plaintiff only seeks to interfere with the attempt to collect such money damages, no important state interest is implicated. Putting aside whether the "important State interest" test may be applied selectively to just "one aspect" of the ongoing state proceeding,[2/] *see* pp. 6-8, *supra,* this position is completely

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given the federal courts." *Deakins v. Monaghan*, 484 U.S. 193, 204 (1988). Indeed, abstention is "the normal thing to do" when federal courts are asked to enjoin such state court proceedings. *NOPSI v. Council of New Orleans*, 491 U.S. 350, 359 (1989); *Younger v. Harris*, 401 U.S. 37, 45 (1971). In fact, "[w]here a case is properly within [the *Younger*] category of cases, there is no discretion to grant injunctive relief." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 816 n.22 (1976).

2/ The tobacco companies believe, as the Court of Appeals did, that it is their perogative to determine and label the "principal" and "primary" aim of the State's lawsuit. In their zeal to do so, and in furtherance of their deceptive course of conduct, they quote selectively and misleadingly from the Petitioner's press releases and omit plain references to the non-monetary relief replete in the State's Complaint. (Opposition at 6) For example, the Attorney General did not say that "his 'primary purpose' in bringing the suit was to seek to obtain a massive monetary recovery," as the tobacco companies represent to this Court. (*Id.*) Rather, he said that "[*a*] primary purpose of the suit is recovery of Medicaid funds . . . ." (JA A-257)(emphasis supplied) Further, they fail even to quote the beginning of the Attorney General's July 18, 1996 press release, which reads:

> Attorney General Richard Blumenthal today filed a $1 billion lawsuit against the tobacco industry -- the largest civil lawsuit ever brought by the State of Connecticut -- to recover Medicaid money spent on tobacco-related illnesses and to halt the aggressive

untenable. Under their theory, whenever a state seeks monetary recovery as one form of relief in state court, the state court defendant can challenge that monetary relief preemptively in federal court, thereby significantly increasing federal caseloads and duplicating proceedings that can properly be adjudicated in state courts. The Petitioner and the amici from 50 separate jurisdictions, backed by this Court's precedents and the principles of comity, federalism, equity and judicial economy that underlie the *Younger* doctrine, fundamentally disagree.

In both *Pennzoil Co. v. Texaco*, 481 U.S. 1, 11 (1987), and *Trainor v. Hernandez*, 431 U.S. 434 (1977), this Court rebuffed federal plaintiffs' attempts to interfere with the imposition of monetary liability against them in the State court. These cases represent examples of "important state interests" in "ongoing state proceedings" that justify and support the application of *Younger* abstention. The best the tobacco companies can do is to explain that the state interests in those cases differ somewhat from this case. In doing so they fail utterly to demonstrate how the state interests at stake in Connecticut's lawsuit are in any respect less important than the interests involved in *Pennzoil* and *Trainor*.

Trainor concerned a state's attempt to safeguard the fiscal integrity of its public assistance programs against an individual who had fraudulently concealed assets when applying for and receiving thousands of dollars in welfare

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> marketing of tobacco products to children and teenagers. (JA A-255) (emphasis supplied).

Finally, they decide to omit the sentence that reads:

> The State is also seeking to put an end to the tobacco industry's 40-year conspiracy of deception, suppression and misrepresentation, and to protect children from the dangers of tobacco by ending the industry's practice of targeting its advertising and promotions towards minors. (JA A-256).

benefits. *Trainor*, 431 U.S. at 444. Connecticut's state law claims for money damages implicate state interests at least as important: its attempt to safeguard the fiscal integrity of its Medicaid and other welfare programs against ten tobacco giants who have by their wrongful, deceptive, and anticompetitive conduct inflicted billions of dollars in damage upon Connecticut's economy and the public fisc.[3/]

[3/] The Court of Appeals improperly downplayed the significance of money damages available under the Connecticut Unfair Trade Practices Act ("CUTPA"), as do the tobacco companies (Opposition at 15-16), citing the fact that under Connecticut law private citizens can also bring such an action. *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 103, 106-07 (2d Cir. 1997) To the contrary, the Connecticut Legislature found the public policies underpinning CUTPA so compelling it decided to supplement the state's sovereign enforcement powers by permitting private attorney general actions to vindicate these interests. *Gill v. Petrazzuoli Bros., Inc.*, 10 Conn. App. 22, 33 (1987). In fact, in the past five calendar years, the Connecticut Attorney General's Office has logged the commencement of 578, 511, 373, 410 and 467 CUTPA actions. Under the Court of Appeals' opinion, these cases would all be liable to preemptive federal actions. Moreover, a sovereign enforcement action under CUTPA permits the state monetary remedies such as civil penalties that are not available in a private attorney general CUTPA action.

The tobacco companies also place undue reliance upon the Connecticut General Assembly's collective decision not to pass legislation relating to a suit such as this. First, the General Assembly did not "den[y] authorization," as the companies contend. (Opposition at 2) The bills referred to were never reported out of committee and never voted upon, up or down. Second, the bills would only have affected, if at all, the State's claims for Medicaid reimbursement: it would not have affected statutory claims for Anti-trust or unfair trade practices. "Inquiry into legislative motive is often an unsatisfactory venture. . . . What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pacific Gas & Energy Resources Comm'n*, 461 U.S. 190, 216 (1983). This inquiry is even less satisfactory when seeking to determine why legislators *failed* to enact a measure. The General Assembly may have declined to pass the bill because it determined, as the

II. THE TOBACCO COMPANIES' THEORY THAT THEY MAY CHALLENGE "ONE ASPECT" OF THE STATE'S SUIT AND AVOID *YOUNGER* ABSTENTION LACKS ANY PRECEDENT.

> The tobacco companies assert:
>
> [W]hat the Second Circuit did was to analyze the scope of the *Companies' Federal Complaint*, and to determine whether *the aspects of the State lawsuit with which the Federal Complaint would interfere* -- namely, the State's attempt to obtain a monetary recovery in favor of itself of medical expenses paid -- implicated an important interest for *Younger* purposes. (Opposition at 9) (emphasis supplied)

This defense of the Second Circuit's decision proceeds from a fundamentally misguided and doctrinally flawed premise: that the federal plaintiffs may avoid *Younger* abstention by challenging only one "aspect"[4/] of the State's action (in this

> Attorney General contended, that enactment of the bill was unnecessary for the State to obtain the relief sought in the complaint.

[4/] To serve their present purposes the tobacco companies modestly claim that their federal action seeks only to interfere with "one aspect" of the pending state court action. In point of fact, their claimed relief could not be more sweeping. Their complaint asks the federal court to enjoin the State "from *bringing*, *prosecuting*, *imposing* or *enforcing* liability pursuant to the Threatened Lawsuit." (Respondents' Appendix RA-27) Compelling evidence that this new found modesty is in fact entirely disingenuous is the tobacco companies' First Amendment claim (Seventh Claim). In its state court action, the State prays for an order that each defendant fund a "corrective public education campaign to remedy the unfair and deceptive acts and practices complained of." (Appendix to Petition A-127) Anticipating this claim for relief, the tobacco companies alleged in their federal action that such an order would compel them "to pay for speech with which they

case a particular claim for relief) that they claim does not implicate an important state interest, although admittedly other aspects of the State's action do implicate important state interests.[5/]

First, none of this Court's precedents support the tobacco companies' proposed dissection theory, and they have cited none. In fact, such a theory would be directly contrary to *NOPSI v. Council of New Orleans*, 491 U.S. 350, 375 (1989), which instructs courts to look to "the importance of the *generic proceedings* to the State." Examining "one aspect" of those proceedings would constitute a "specific," rather than "generic," analysis. Further, it would improperly focus on "outcomes," which *NOPSI* discountenanced. *Id.* Thus, the tobacco companies' statement that the "defendants [sic] offered ample evidence" "showing that the aspect of the State's suit with which the Companies' Federal Complaint seeks to interfere . . . does not implicate important State interests" (Opposition at 20) is irrelevant because that is not the inquiry.[6/]

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disagree" in violation of the First Amendment, and ask for a federal injunction on that ground. (Respondents' Appendix RA-24 to RA-25) Such an interference with the state court action has nothing at all to do with money damages for health care costs, contrary to the tobacco companies' current characterization of their suit.

5/ The Petitioner, of course, contends that even that "one aspect" of the suit vindicates an important state interest.

6/ Consistent with their attempt to turn the *Younger* doctrine on its head, the tobacco companies claim that the Court of Appeals' statement that "we do not find that the *federal* action implicates an important state interest within the meaning of *Younger*" (emphasis supplied) was not an error. If it was not, the Court of Appeals clearly applied the wrong test.

In *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 432 (1982), the Court stated: "The question in this case is three-fold: first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme

Further, in many cases, including this one, it is impossible to dissect surgically one "aspect" of the case and litigate it in a federal forum without interfering with the State suit or duplicating legal proceedings. The State's monetary claims are necessarily intertwined with, both begally and factually, its claims for injunctive relief. For example, all of the state court claims for relief flow from various legal claims of liability (e.g., Commerce Clause, Due Process). The tobacco companies claim to have numerous federal defenses to each that would prevent the imposition of such liability. To adjudicate those defenses, even if purporting to address only the money damages portion of the state suit, a federal court would necessarily have to resolve state and federal law questions that the state court would simultaneously address. The several policies underlying the *Younger* doctrine (federalism, comity, judicial economy and eschewing unnecessary determinations of state and federal law) all counsel a federal abstention in such an instance. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-11 (1987).

III. THE POSSIBILITY OF *PULLMAN* ABSTENTION DOES NOT OBVIATE THE NEED FOR THIS COURT'S REVIEW.

The State has never asked the District Court to abstain under *Railroad Commission v. Pullman Co.*, 312 U.S.

Court constitute *an ongoing state judicial proceeding*; second, do *the proceedings* implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." Clearly (and obviously) under *Younger* the focus is properly on whether the *state court* proceedings implicate an important state interest, not whether the federal proceedings implicate an important state interest. *See also Hawaii v. Midkiff*, 467 U.S. 229, 237-38 (1984) ("Under *Younger*-abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests.").

496 (1941). On the other hand, the tobacco companies have beseeched the federal courts at every level to abstain under the *Pullman* doctrine. They now urge this Court to decline review of this case because the District Court has yet to rule on whether *Pullman* abstention is appropriate. This persistent invocation of *Pullman* abstention reveals the true motivation for this suit.

Clearly the tobacco companies seek to delay a final adjudication of the State's claims against them by keeping alive, if in abeyance, a subsequent federal court adjudication of various defenses until after completion of the state court proceedings. Plainly they hope to add years to the litigation of this case since, for every month they can protract the litigation, they garner hundreds of millions of dollars in ill-gained profits. Further, they seek to consume the State's resources by forcing battles on two fronts and maintaining in place a "federal check" to the state court's activities other than this Court's ultimate power of review.

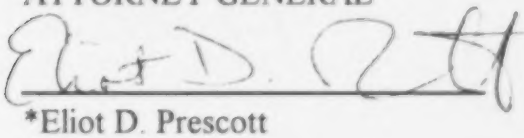
This is an inappropriate use of the *Pullman* doctrine and counsels in favor of this Court's review of the Second Circuit's decision. The considerations that underlie *Pullman* (i.e., unsettled state law questions that potentially render the federal constitutional questions advisory) also play a part in *Younger* abstention. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).[7/] Under a *Younger* analysis, these considerations are buttressed by comity considerations, by which an "inferior" federal court recognizes the equal dignity that state courts have in enforcing federal constitutional law.

7/ "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. [illegible] ...9 (1987). Of course, the Petitioner would also have no [illegible]anteed avenue for returning to this Court should the District [illegible]urt abstain, or fail to abstain, under *Pullman*.

Finally, declining review of the decision below because of the possibility of *Pullman* abstention would leave in place an erroneous Court of Appeals precedent with the potential to inflict great harm upon state sovereign interests, including interests transcending the context of the several states' actions against the tobacco companies. (*See* Petition at 15) For these reasons it is important for this Court to review this issue now rather than await the results of other of the tobacco companies' abusive and preemptive lawsuits.

Respectfully submitted,

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